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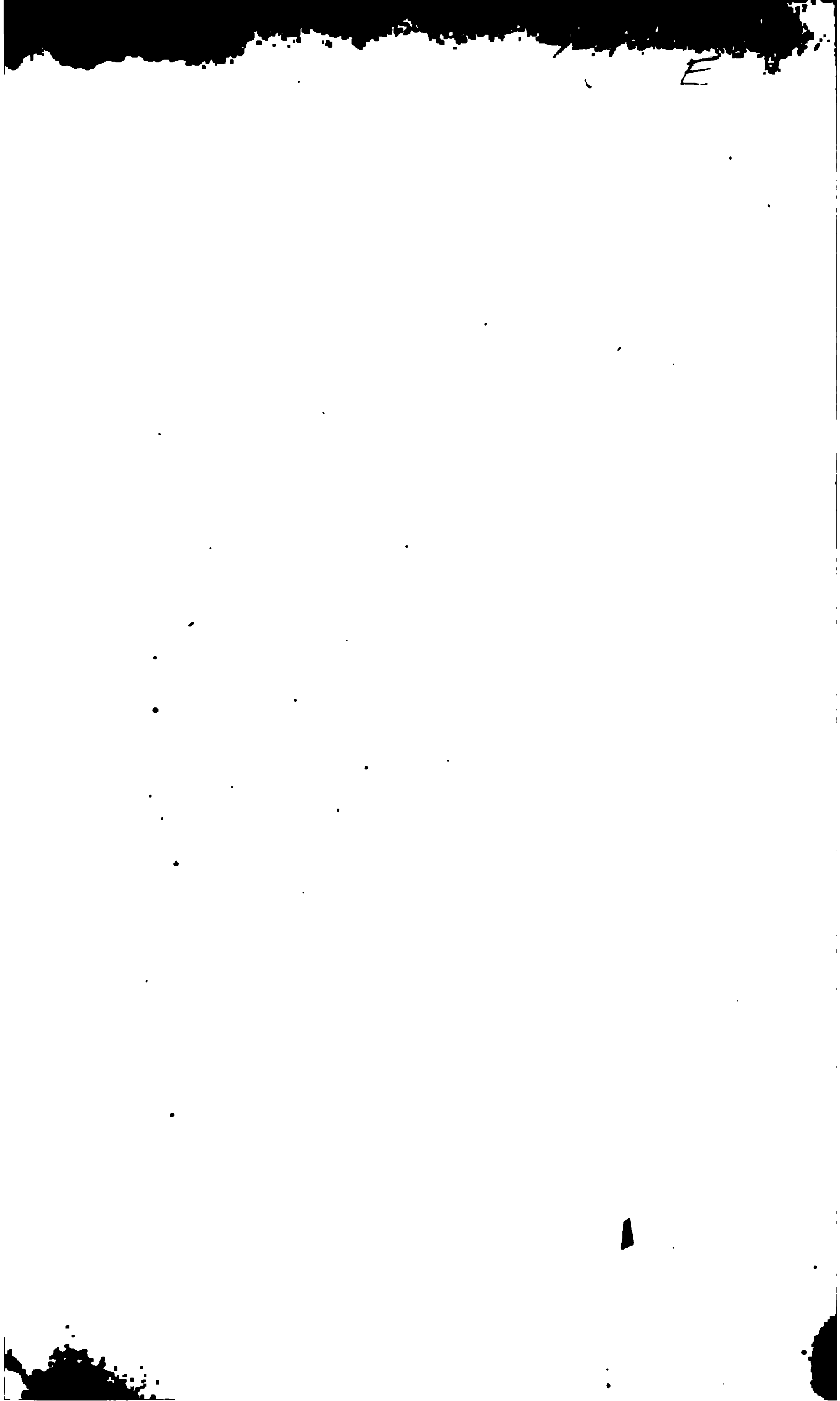
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# REPORTS

OF

## CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

*Millar & Co.*

HERETOFORE CONDENSED BY

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VOL. LV.

CONTAINING

*The Cases in the Court of Queen's Bench, in Trinity Vacation, Michaelmas Term and Vacation,  
Hilary Term and Vacation, and Easter Term and Vacation, 1846*

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CASES  
ARGUED AND DETERMINED  
IN  
THE QUEEN'S BENCH,  
IN  
Trinity Vacation,  
IX. VICTORIA.

(TRINITY VACATION CONTINUED FROM VOL. VII.)



**BELCHER and Others, Assignees of CHAPMAN, a Bankrupt, against  
CAMPBELL and Another. Wednesday, July 9th.**

C. being indebted to defendants in a sum not yet payable, and pressed by them for security, handed to them a note by which C.'s debtor, S., promised to pay C. a sum exceeding C.'s debt to defendants. This note was not payable to order; but C. endorsed it when he handed it over. Afterwards defendants pressed C. to obtain negotiable paper from S. instead of the note, which they re-delivered to C. for that purpose; S. thereupon, after the term for C.'s paying defendants had elapsed, took back the note, and accepted bills of exchange drawn by C., exceeding C.'s debt to defendants, which bills C. desired him to give to the defendants. At the time of the acceptance, C. intended to commit an act of bankruptcy, which S. knew; but defendants did not know it. After the act of bankruptcy, S. delivered the bills to defendants. In trover by C.'s assignees for the bills, issue being joined on a plea of Not possessed,

**Held**, that though S. was not agent for defendants, the bills were not, at the time of the act of bankruptcy, in C.'s possession as reputed owner with the consent of the true owners, within stat. 6 G. 4, c. 16, s. 72, merely as being in C.'s hands; inasmuch as they were subject to the same rights as the note, which C. held only, for a specific purpose, as agent for defendants,

But that, nevertheless, if S. did not know of the assignment by C. to defendants of the debt due from S. to C., the assignment was not good as against the plaintiffs; and therefore, as against them, the defendants had no title, legal or equitable, to the note, even while it remained in their hands, and consequently, none to the bills. But that, if S. did know, defendants were entitled to succeed on the issue.

**TROVER**, by the plaintiffs as assignees of the estate and effects of George Chapman, a bankrupt, against the defendants, who were attorneys carrying on business \*in partnership, to recover the value of six bills of exchange, mentioned in the declaration, all bearing date on the 19th [ \*2 July, 1842, and drawn, on that day, by the bankrupt, upon, and accepted by, one William Frost Sweetland, payable to the bankrupt or his order,

at 12, 24, 36, 48, 60, and 72 months after date, respectively. The bills, except the last, were for 160*l.* each ; the last was for 170*l.*

The defendants pleaded Not guilty, and a denial that the plaintiffs were entitled to the bills ; upon which pleas the plaintiffs joined issue : and the cause was tried at the sittings, (in Middlesex,) after Michaelmas term, 1843, before the Lord Chief Justice, when by direction of his lordship, a verdict was found for the plaintiffs, damages 970*l.*, subject to be reduced to 40*s.* on the bills being given up, or the amounts received paid, and with leave for the defendants to move to enter a nonsuit. A motion for that purpose was accordingly made in Hilary term, 1844, when the court recommended that the facts should be turned into a special case, which was stated as follows.

In the spring of 1842, the bankrupt was a client of the defendants ; and they advanced him a sum of 400*l.*, on the security of his warrant of attorney to confess judgment in case of non-payment on 16th July in the same year ; on which day, and not before, the said warrant of attorney was capable of being enforced. About a fortnight before 19th July, the bankrupt was applied to by the defendants for further security. In answer to that application, he offered them a promissory note, which he then held, and which he had obtained of the maker, at the time of its date, in  
 \*3] payment for value, of which note the following is a copy.

“ 1000*l.* 0*s.* 0*d.*

*London, June 30th, 1840.*

“ I promise to pay Mr. George Chapman, one thousand pounds, for value received, by instalments of not less than one hundred pounds per annum, on or before the thirteenth day of June, 1845 ; the receipt of George Chapman for each instalment to be a sufficient discharge, and that only.

“ W. F. SWEETLAND.”

Endorsed “ George Chapman.”

The defendants took the note from the bankrupt : but, a few days after, they again applied to the bankrupt, objecting to the sufficiency of the security on the ground that it was not negotiable, and urged the bankrupt to endeavour to procure Sweetland to give him, the bankrupt, negotiable paper instead of it : to this the bankrupt assented ; and the defendants gave it back to the bankrupt to get other bills for it. Sweetland, on being applied to, at first refused to give negotiable paper, but was afterwards induced, by an arrangement between him and the bankrupt, to accept, in lieu of that note, the bills of exchange already mentioned.

On the 18th July, 1842, the bankrupt, being largely indebted, and pressed for payment by several creditors, resolved to abscond (as he actually did on the 19th,) to France, in order to avoid their importunities ; and he then informed Sweetland of his purpose.

On the morning of 19th July, the bills mentioned in the declaration were drawn by the bankrupt, and accepted by Sweetland, and given by the latter to the former for the said promissory note, which was then

"returned by the bankrupt to Sweetland, and the following endorsement made upon it. [\*4

"This bill or note is cancelled for six other notes or bills for the amounts of 160*l.*, 160*l.*, 160*l.*, 160*l.*, 160*l.*, and 170*l.*

"July 19th, 1842."

"GEORGE CHAPMAN."

The bankrupt then endorsed in blank all the bills, except that for 170*l.*, which is not endorsed, and handed them all to Sweetland, with a direction to deliver them to the defendants.

Immediately afterwards, that is to say, nine o'clock on the morning of the 19th, the bankrupt, in pursuance of his said purpose of avoiding his creditors, sailed for France, and thereby committed an act of bankruptcy; of which the defendants had notice before the issuing of the fiat, and before the said bills of exchange, or any of them, came into their possession.

Sweetland, after the departure of the bankrupt, on the same day, informed the defendants of what had been done by the bankrupt, and refused to hand over the bills without their indemnity; which having been given, on a subsequent day after the bankruptcy, the said bills of exchange were handed to the defendants, who have ever since retained, though required by the assignees to deliver them up.

The docket was struck on the 22d, and the fiat issued on the 23d day of July: and under that fiat the plaintiffs have been appointed assignees.

The alleged conversion is admitted: and the question for the opinion of the court is, whether, under the above circumstances, the assignees are entitled to recover the value of the said bills of exchange, or any of them.

"If the court should hold that they are so entitled, then the verdict is to stand for the plaintiffs for the amount of the bills of exchange, or such of them as they may be held entitled to, subject to be reduced to 40*s.* on the bills being given up, or the amount received thereon paid, as the case may be. If otherwise, then a nonsuit is to be entered, or a new trial directed, as the court shall think fit. [\*5

The case was argued in last term. (a)

*Willes*, for the plaintiffs. As the bills were delivered to the bankrupt by his debtor, Sweetland, and were capable of being made use of by the bankrupt, they are *primâ facie* the property of his assignees, unless something has happened, since the bankrupt had the bills, which changed the property. It lies therefore on the defendants to show that such an event has occurred. The defendants cannot rely on the redelivery to Sweetland, by the bankrupt, before the bankruptcy. Sweetland was not their agent: he held the bills as the agent of the bankrupt; and the bankrupt, at any time before the delivery to the defendants, might have revoked the order which he had given to Sweetland, and have resumed the custody of the bills, Sweetland not having engaged with the defendants to deliver the bills to them; *Brind v. Hampshire*, 1 M. & W. 365, S. C. Tyr. & G.

(a) May 30th. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Ja.

790; where *Williams v. Everett*, 14 East, 582, was acted on. The bankruptcy, with notice to Sweetland, was a countermand of the authority  
 \*6] given by the bankrupt. It may perhaps be \*contended that, before the delivery of the bills to Sweetland, the defendants had an equitable title to them. The facts, however, amount only to this: that the defendants, not being satisfied with the security which they held, demanded better: but no engagement had been made, either by the bankrupt to supply better security, or by the defendants to suspend, in the meanwhile, enforcing the original security. But, even if there had been an equitable title in the defendants, it would have been defeated, as against the assignees, by sect. 72 of stat. 6 G. 4, c. 16. The bankrupt, at the time of his bankruptcy, was reputed owner of Sweetland's note. The note, which hardly seems to have been taken by the defendants as a security at all, only bound Sweetland to pay to the bankrupt himself: the bankrupt could transfer no legal title to such a note; and, considered as an equitable transfer of a debt, the transaction was void, under sect. 72, as against the assignees, for want of notice to Sweetland; *Buck v. Lee*, 1 A. & E. 804; *Dean v. James*, 1 A. & E. 809, note (a); *Ex parte Monro*, Buck's Ca. B. 300; *Ex parte Arkwright*, 3 Mont. D. & De G. 129; *Ex parte Price*, 3 Mont. D. & De G. 586. Further, the deposit of the first note with the defendants was intended to operate only by way of pledge; and, to make a pledge effectual against assignees, it must be in the hands of the pledgee at the time of the bankruptcy: here the case is not so. The law of England does not recognise a mere contract to hypothecate, as passing a title to the possession. No point is made, on behalf of the plaintiffs, as to the non-endorsement of the bill of 170*l.*: that fact makes no difference in the rights of the parties.

\*7] \**Hugh Hill*, contra. Although the endorsement of the note of 1840 gave no legal remedy against the maker, the bankrupt, by endorsing, made himself legally liable to the defendants; *Hill v. Lewis*, 1 Salk. 132, 133. But it is enough for the present purpose that the bankrupt at least assigned the debt which was due to him from Sweetland, and the note as its symbol. The debt due from the bankrupt to the defendants was a good consideration for the assignment, though it was not payable at the time of the assignment; *Walker v. Rostron*, 9 M. & W. 411. It is true that, in that case, the defendant, who stood in the same position as Sweetland here, had assented to hold for the benefit of the plaintiff; but that makes no practical distinction between the two cases. The general necessity of such assent is said to be shown by *Brind v. Hampshire*, 1 M. & W. 365; S. C. Tyr. & G. 790. But the knowledge by Sweetland of the assignment was enough, at whatever time before the bankruptcy he acquired it; *Tibbitts v. George*, 5 A. & E. 107; *Burn v. Carvalho*, 7 Sim. 109; (a) *Hutchinson v. Heyworth*, 9 A. & E. 375; *Row v. Dawson*,

(a) See *Burn v. Carvalho*, in Exch. Ch., 1 A. & E. 883, affirming *Carvalho v. Burn*, in K. B., 4 B. & Ad. 382.

1 Ves. sen. 331 ; *Yeates v. Groves*, 1 Ves. jun. 280 ; *Bailey v. Culverwell*, 8 B. & C. 448 ; *Crowfoot v. Gurney*, 9 Bing. 372. [PATTESON, J. Would you contend that, even if Sweetland had never heard of the transaction between the bankrupt and defendants, the debt due from Sweetland would, as against the assignees, have passed to the defendants?] It is not necessary for the purpose of this part of the argument to maintain that proposition. [PATTESON, J. I find no statement of \*Sweetland's knowledge.] He cannot but have had knowledge. Even [\*8 if he had not, this case differs from the ordinary case of an assignment, because the bankrupt had endorsed Sweetland's note to the defendants, and, therefore, according to *Hill v. Lewis*, 1 Salk. 132, had become legally liable to them. [PATTESON, J. But how does that affect the question of the right of the bills? It can carry the defendants' claim no farther than if the bankrupt, instead of so endorsing, had drawn a new promissory note in favour of the defendants.] The seventy-second section is, in reality, not applicable. The original note was in the bankrupt's hands, not as reputed owner, but for a specific purpose, that of exchanging it for better security: it therefore never passed to the assignees ; *Bruce v. Hurly*, 1 Stark. N. P. C. 23 ; then Sweetland clearly delivered back the bills in exchange for the note ; and the bankrupt held the bills subject to the same title and rights as the note. It is not necessary to consider whether in some other form of action the defendants may not be liable to the plaintiffs for the excess over the debt owing from the bankrupt to the defendants: they are entitled to succeed on the plea that the plaintiffs were not possessed of the bills.

*Willes*, in reply. It is not necessary to discuss the principle of *Hill v. Lewis*, and the cases qualifying or explaining the doctrine there, as *Gwinnell v. Herbert*, 5 A. & E. 436 ; and *Penny v. Innes*, 1 C., M. & R. 439, S. C. 5 Tyr. 107. The question is, not whether there was a debt between the bankrupt and defendants, but what are the rights of the assignees and defendants as \*respects these bills. There was, no doubt, a suf- [\*9 ficient consideration, as between the bankrupt and defendants, for the assignment to the defendants of Sweetland's debt to the bankrupt. But the fact of notice, at least, to Sweetland, must be shown, to take the case out of the seventy-second section ; and no notice appears. Again, *Burn v. Carvalho*, 1 A. & E. 883, (a) shows that the equitable assignment does not take place if the debt transferred exceeds the debt which is the consideration for the transfer. *Bruce v. Hurly*, 1 Stark. N. P. C. 23, is inapplicable. There the instrument was negotiable ; the plaintiffs (answering to the defendants here) were legal owners of the note as endorsees ; they had handed it to the endorers, as mere agents, to obtain payment ; and the only question was, whether they had lost their right as endorsees, which they clearly had not. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court.

(a) *Carvalho v. Burn*, 4 B. & Ad. 382.



This was an action of trover, brought by the assignees of George Chapman against the defendants, to recover six bills of exchange drawn by the bankrupt upon, and accepted by, William Frost Sweetland, payable to his own order, and all but one endorsed by the bankrupt to the defendants. The pleas were:—1. Not guilty; 2. That the plaintiffs were not possessed of the bills.

A verdict was taken for the plaintiffs, with liberty for the defendants to move for a nonsuit; and the facts were afterwards stated in a case; by which it appears that the bankrupt, being indebted to the defendants, \*and being pressed for security in the beginning of July, 1842, \*10] delivered to them a promissory note, made by Sweetland, dated June 30th, 1840, for 1000*l.*, payable to the bankrupt only, which note was not negotiable. The defendants, a few days after, requested the bankrupt to persuade Sweetland to exchange the note for negotiable bills, and gave him the note to get it so exchanged. Sweetland assented to the proposal; and, accordingly, on the 19th July, 1842, the bankrupt drew the bills in question in this cause, which Sweetland accepted; and the bankrupt endorsed all but one, and left them with Sweetland, desiring him to hand them over to the defendants. On the same day the bankrupt went to France, and thereby committed an act of bankruptcy, of his intention to do which he had informed Sweetland the day before; but the defendants knew nothing of it. Sweetland afterwards handed over the bills to the defendants, upon having an indemnity given to him. Upon these facts, the question is, whether the plaintiffs are entitled to recover the bills, or a nonsuit ought to be entered.

We agree with the learned counsel for the plaintiffs, that Sweetland cannot be considered as the agent of the defendants. No communication took place between them prior to the bankruptcy; nor had Sweetland done any act by which he had engaged to them that he would deliver to them, or hold for their use, the bills in question. The case, therefore, in this respect, stands in the same position as if the bills had been in the actual possession of the bankrupt at the time of the bankruptcy. But we do not think that the bills can on that account be said to have been in the possession, order, or disposition of the bankrupt by \*11] the consent of the \*defendants, the true owners, within the meaning of stat. 6 G. 4, c. 16, s. 72, because they were substituted for the note for 1000*l.*, and any facts or arguments applicable to that note are applicable to them. Now, that note was placed in the possession of the bankrupt by the defendants for a specific purpose, that of being exchanged for the bills in question, which bills (or the note, if no such bills were given by Sweetland) were manifestly intended to be forthwith handed over to the defendants. Therefore, neither the note, nor consequently the bills, would, by reason of being in the hands of the bankrupt at the time of the bankruptcy, come within the seventy-second section of the act.

But it was argued that, as the note was not negotiable, it is like a bond, and the debt secured thereby from Sweetland to the bankrupt would be within that section, notwithstanding the delivery of the note to the defendants, unless it appeared that Sweetland had notice of such delivery; therefore, that the plaintiffs would take the debt, and would be entitled to have the note, even if it had remained in the defendants' hands at the time of the bankruptcy, and, consequently, are entitled to the substituted bills, under the circumstances stated in the case, for want of any statement that notice of the delivery of the note to the defendants had been given to Sweetland before the bankruptcy.

It is not argued that any formal notice to Sweetland, much less any assent on his part, was necessary; but it is urged that knowledge of the delivery of the note to the defendants is not brought home to him. It seems hardly probable that he should not have been informed of it when the bankrupt was persuading him to give negotiable securities in lieu of the note; and we doubt much whether this point was intended to be raised by the case. But, undoubtedly, no statement of notice [\*12. appears on the case; and all the facts are consistent with the absence of such notice. We feel it, therefore, difficult to say that this objection must not prevail. If it be agreed by the parties that notice was given, we are clearly of opinion that a nonsuit ought to be entered. If, on the other hand, it be agreed that no notice was given, then we think the verdict for the plaintiffs ought to stand; for we do not consider this as a mere deposit for the purpose of confirming a lien, in which case trover will not lie for the instrument deposited, though the debt secured by it pass to the assignees under the seventy-second section, as was held in *Gibson v. Overbury*, 7 M. & W. 555.

But, as the fact of notice or no notice is not agreed on, we think that there ought to be a new trial.

Rule absolute for a new trial.

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\*STAMP against SWEETLAND and Another. *Wednesday*, [\*13.  
*July 9th.*

Stat. 4 G. 4, c. 95, s. 30, enacts that, if any collector of tolls "shall demand and take a greater or less toll from any person than he shall be authorized to do by virtue of the powers of any act, or of the orders and resolutions of the trustees or commissioners made in pursuance thereof," he shall be liable to a penalty; which is made recoverable by conviction before justices, and distress, and imprisonment in default of sufficient distress.

A conviction stated that a collector "*did demand and take*," from J. L., at a gate on a turnpike road, "a certain toll, to wit, *the toll or sum of 4d.*, as and for a toll then and there payable by the said J. L., at such gate, for a certain horse then and there drawing a certain cart upon two wheels only, and which said cart was then and there drawn by such one horse only, and driven by him, the said J. L., in, along and over the said turnpike road; and for which said horse, drawing such cart, a certain toll, to wit, the sum of 8d., was then and there payable by the said J. L., *the said toll or sum of 4d.*, so demanded and taken by the said" collector "as aforesaid, then and there *being a less toll than he*" "*was then and*

*there authorized to take for the cause aforesaid by virtue of the powers of any act, or of the orders and resolutions of the trustees or commissioners of the said turnpike road, made in pursuance thereof, contrary to the form of the statute," &c.*

*Held*, a sufficient conviction, though no provisions of any particular turnpike act, or orders or resolutions of trustees or commissioners, were set forth or referred to.

A warrant of commitment on this conviction, for want of sufficient distress, stated that the collector was convicted, for that he "*did suffer and permit J. L. to pass through*" the turnpike gate, "*with a cart drawn by one horse, on payment of the sum of 4d., as toll for the said cart drawn by one horse, the legal toll due and payable in respect of the said cart drawn by one horse being the sum of 6d., contrary to the statute," &c.*

*Sumble*, that the warrant gave a sufficient description of the offence under the statute. But

*Held* that, supposing it insufficient, the conviction would cure the defect.

Sect. 147 of stat. 3 G. 4, c. 126, enacts "that if any action or suit shall be commenced against any person or persons for any thing done in pursuance of this act," "if the matter or thing complained of shall appear to have been done under the authority and in execution of this act," "the jury shall find for the defendant."

*Quære*, whether justices committing by virtue of this act, and sued in trespass, be entitled to a verdict on the ground, only, that they *bonâ fide* believed themselves to be putting the act in execution.

### TRESPASS for assault and false imprisonment.

Plea, Not guilty (by statute.) (a) Issue thereon.

\*14] On the trial, before COLERIDGE, J., at the Devonshire \*Summer assizes, 1843, it appeared that the defendants, justices of Devonshire, had convicted the plaintiff, and had committed him in pursuance of such conviction. The conviction was put in, and was as follows:

"County of Devon, to wit.—Be it remembered that, on the 10th day of October, in the sixth year," &c., A. D. 1842, "Joseph Stamp, of," &c., "collector of the tolls at a certain turnpike gate, called," &c., "situate," &c., "is convicted before us, John Sweetland and George Savage Curtis,

(a) Stat. 4 G. 4, c. 95,

Sect. 30 enacts that, if any collector of tolls shall demand and take a greater or less toll from any person than he shall be authorized to do by virtue of the powers of any act, or of the orders and resolutions of the trustees or commissioners made in pursuance thereof, or shall demand and take a toll from any person or persons who shall be exempt from the payment thereof, and who shall claim such exemption," "then and in every such case every such toll collector shall forfeit and pay any sum not exceeding 5*l.* for every such offence."

Sect. 87 enacts that "no proceeding to be had or taken, in pursuance of this act, shall be quashed or vacated for want of form, or removed," &c.

Sect. 88 enacts that all the powers, authorities, provisions, &c., matters and things whatsoever, contained in stat. 3 G. 4, c. 126, so far as not expressly altered or repealed, shall be in force with respect to stat. 4 G. 4, c. 95, as if re-enacted in the body thereof.

Stat. 3 G. 4, c. 126, s. 141, provides for the recovery of penalties before a justice of peace, by conviction, distress, and imprisonment in default of sufficient distress.

Sect. 147 enacts "that if any action or suit shall be commenced against any person or persons for any thing done in pursuance of this act, then and in every such case such action or suit shall be commenced or prosecuted within three months after the fact committed, and not afterwards; and the same and every such action or suit shall be brought in the county or place where the cause of action shall have arisen, and not elsewhere; and the defendant or defendants in every such action or suit shall and may plead the general issue, and at the trial thereof, give this act and the special matter in evidence; and if the matter or thing complained of shall appear to have been done under the authority and in execution of this act, or if any such action or suit shall be brought after the time limited for bringing the same, or be brought and laid in any other county or place than as aforementioned, then the jury shall find for the defendant or defendants, and if the plaintiff shall become nonsuit, or discontinue his or her action after the defendant shall have appeared, or have a verdict against him or her, or if upon demurrer, judgment shall be given against the plaintiff, the defendant shall and may recover treble costs, and have the like remedy for recovery thereof as any defendant or defendants hath or have in any cases by law."

Esquires, two of her majesty's justices of the peace for the said county of Devon, for that he, \*the said Joseph Stamp, on," &c., (18th July, [\*15 1842,) "at the parish," &c., "being then and there collector of tolls at a certain toll gate there, called," &c., "upon a certain turnpike road there situate, leading from," &c., "did demand and take from one John Lee, at the said gate, a certain toll, to wit, the toll or sum of 4*d.*, as and for a toll then and there payable by the said John Lee at such gate for a certain horse then and there drawing a certain cart upon two wheels only, and which said cart was then and there drawn by such one horse only, and driven by him, the said John Lee, in, along and over the said turnpike road; and for which said horse, drawing such cart, a certain toll, to wit, the sum of 6*d.*, was then and there payable by the said John Lee, the said toll or sum of 4*d.*, so demanded and taken by the said Joseph Stamp as aforesaid, then and there being a less toll than he, the said Joseph Stamp, was then and there authorized to take for the cause aforesaid by virtue of the powers of any act, (a) or of the orders and resolutions of the trustees or commissioners of the said turnpike road, made in pursuance thereof, contrary to the form of the statute made," &c. (4 G. 4, c. 95.) "And we do hereby declare and adjudge that the said Joseph Stamp hath forfeited for the said offence the sum of 5*l.* Given," &c., "the day and year," &c.

"JOHN SWEETLAND. (L. s.)

"G. S. CURTIS. (L. s.)"

\*The commitment, which was also put in, was as follows:

"County of Devon, to wit.—To the constable of Chudleigh in [\*16 the said county, and to the keeper of the common jail at Exeter in the said county. Whereas Joseph Stamp, of," &c., "was, on," &c. (10th October, 1842,) "convicted before us, John Sweetland and George Savage Curtis, Esquires, two," &c., "upon the oath of," &c., "for that he, the said Joseph Stamp, being collector of the tolls at the turnpike gate called," &c., "did on," &c., (18th July, 1842,) "suffer and permit Owen Conley, John Lee, and James Palmer to pass through the said turnpike gate, with a cart drawn by one horse, on payment of the sum of 4*d.*, as toll for the said cart drawn by one horse, the legal toll due and payable in respect of the said cart drawn by one horse being the sum of 6*d.*, contrary to the statute in that case made and provided: by reason whereof the said Joseph Stamp hath forfeited the sum of 5*l.* And whereas, on," &c. (2d January, 1843,) "we did issue our warrant to the constable of Chudleigh to levy the said sum of 5*l.* by distress and sale of the goods and chattels of him the said Joseph Stamp, and to distribute the same ac-

(a) The act regulating the toll was stat. 1 & 2 W. 4, c. lxii., local and personal, public; "To amend an act of his late majesty king George the Fourth, for repairing the several roads leading to and from the city of Exeter, and for making certain new lines of road to communicate with the same, and for keeping in repair Exe Bridge and Countess Wear Bridge: and to make and maintain other roads communicating with the said roads." Nothing turned on the particular provisions of the act.

according to the directions of the said statute: And whereas it duly appears to us, upon the oath of John Trueman, the constable aforesaid, that he hath used his best endeavours," &c. (to levy the money on the goods. averment of there being no sufficient distress:) "These are therefore to command you, the said John Trueman, constable," &c., "to apprehend the said Joseph Stamp, and him safely to convey to the common jail at Exeter, in the said county, and there deliver him to the keeper thereof, \*17] together with this precept. And we do \*also command you the said keeper to receive and keep in your custody the said Joseph Stamp for the space of six weeks, unless the said sum shall be sooner paid pursuant to the said conviction and warrant. And for so doing this shall be your sufficient warrant. "Given," &c., (11th January, 1843.)

"JOHN SWEETLAND. (L. s.)

"G. S. CURTIS. (L. s.)"

For the plaintiff objections were made to the warrant of commitment and to the conviction, as will appear by the argument in banc. The learned judge overruled the objections, and, further, was of opinion that the magistrates were protected under s. 147, of stat. 3 G. 4, c. 126, if the jury were of opinion that they had acted bonâ fide on the belief that they were putting in execution stat. 4 G. 4, c. 95, s. 30. The jury found that the magistrates had so acted; and a verdict was taken for the defendants. In Michaelmas term, 1843, *Rogers* obtained a rule nisi for a new trial on the ground of misdirection. In Easter vacation, 1845, (a)

*Cockburn*, *Bevan*, and *Montague Smith* showed cause. The conviction is objected to, on the ground that it does not point out what toll the particular turnpike act, or orders and resolutions of the commissioners, authorized to be taken, but only negatives the authority generally. That, however, is sufficient to bring the case within the thirtieth section of stat. 4 G. 4, c. 95. The general rule is, that it is sufficient if a conviction follow the language of the act. It is true that there are exceptions; as, \*18] for instance, under the Pilot Act, 6 G. 4, c. 125, s. 70, \*knowledge must be found, though the statute does not expressly make it necessary; *Chaney v. Payne*, 1 Q. B. 712. Here, indeed, the conviction does more than follow the statute, or the form in No. 19, of the schedule to stat. 3 G. 4, c. 126; for it states affirmatively what the proper toll was, which seems to have been superfluous.

Then, if the conviction be good, it supports the commitment; *Rex v. Taylor*, 7 D. & R. 622, 623, 624; *Paley on Convictions*, 236, (3d ed.); *Rex v. Rogers*, 1 D. & R. 156; *Daniell v. Philipps*, 1 C., M. & R. 662, S. C. 5 Tyr. 293; *Rogers v. Jones*, 3 B. & C. 409, is inapplicable; there the commitment was on one statute and the conviction on another. In *Wickes v. Clutterbuck*, 2 Bing. 483, nothing appeared on the commitment to give the magistrate jurisdiction. But, further, the commitment is

(a) May 10th. Before Lord Denman, C. J., Williams, and Coleridge, Js.



good. The objection made was that, instead of stating that the plaintiff had demanded and taken less than the authorized toll, (as in the statute and the conviction,) it stated that he did "suffer and permit" parties "to pass through the said turnpike gate," &c., "on payment of the sum of 4d., as toll," &c., the authorized toll being stated to be sixpence. Now this substantially agrees with the statute and the conviction: a literal agreement is not requisite; *Ex parte Goff*, 3 M. & S. 203.(a)

\**Rogers and Cornish*, contra. First, the conviction is bad. It does not show against what statute or regulation the plaintiff had [\*19] offended. A maximum might be appointed by the local turnpike act; a minimum by the commissioners. [COLERIDGE, J. The plaintiff is convicted of taking a toll not authorized by either.] As the conviction is now framed, the plaintiff could not avail himself of it on a second charge for the same offence. Where a power is given to make regulations, and a statute renders it penal to infringe them, the regulations should be distinctly set out; *Newman v. The Earl of Hardwicke*, 8 A. & E. 124; *Rex v. Nield*, 6 East, 417. It is not enough to follow the words of the statute, as has been often decided; *Regina v. Nott*, 4 Q. B. 768, is one of the latest cases.

The warrant does not show, by either statutory language or statement of evidence, that any offence has been committed. Sect. 30, of stat. 4 G. 4, c. 95, varies from sect. 55 (b) of stat. 3 G. 4, c. 126, by adding the word "demand" to the word "take." This shows the importance of stating a demand in the warrant; but no such statement appears expressly or by inference. The necessity of bringing the offence within the statute appears from *Wickes v. Clutterbuck*, 2 Bing. 483; and *Rex v. Judd*, 2 T. R. 255. If a commitment can be aided by a conviction, at least the connection between \*the two should appear; *In the Matter of Elmy* [\*20] and *Sawyer*, 1 A. & E. 843. *Rex v. Taylor*, 7 D. & R. 622, is doubtful law; the courts will now notice defects in the commitment without reference to the conviction itself; *Regina v. Chaney*, 6 Dowl. P. C. 281; *Regina v. King*, 1 Dowl. & L. 721. In *Daniell v. Philipps*, 1 C., M. & R. 662, S. C. 5 Tyrwh. 293, there was a special proviso, (sect. 39 of stat. 7 & 8 G. 4, c. 30,) enacting that no warrant should be void if it alleged a conviction and there were a valid conviction in fact.

*Cur. adv. vult.*

(a) The court having pronounced no decision on the effect of stat. 3 G. 4, c. 126, s. 147, the argument on that point is omitted. The following authorities were referred to. *Weller v. Take*, 9 East, 364; *Beechy v. Sides*, 9 B. & C. 806; *Davis v. Capper*, 10 B. & C. 28; *Wickes v. Clutterbuck*, 2 Bing. 483; *Daniell v. Philipps*, 1 C., M. & R. 662; S. C. 5 Tyrwh. 293; *Lord Oakley v. The Kensington Canal Company*, 5 B. & Ad. 138; *Norris v. Smith*, 10 A. & E. 188; *Wells v. Ody*, 2 C., M. & R. 128; S. C. 5 Tyrwh. 725; *Ballinger v. Ferris*, 1 M. & W. 628; S. C. Tyrwh. & G. 920; *Cann v. Clipperton*, 19 A. & E. 682; *Jones v. Gooday*, 9 M. & W. 736; stat. 13 G. 3, c. 78, s. 81; stat. 5 & 6 W. 4, c. 50, s. 109; stat. 7 Ja. 1, c. 5; stat. 21 Ja. 1, c. 12; stat. 24 G. 2, c. 44, s. 2; *Reed v. Cowmeadow*, 6 A. & E. 661; *Wedge v. Berkeley*, 6 A. & E. 663; *Rix v. Borton*, 12 A. & E. 470; *Gray v. Cookson*, 16 East, 13; *Rogers v. Jones*, 3 B. & C. 409.

(b) But see sect. 53.

Lord DENMAN, C. J., now delivered the judgment of the court. After stating the nature of the action, and the plea, his Lordship proceeded as follows.

The cause of action was a commitment upon a conviction for an alleged offence against the Turnpike Act, 4 G. 4, c. 95, s. 30. The defendants relied, first, on the conviction, to which, as well as to the commitment, objections were made; and, secondly, on the 147th section of stat. 3 G. 4, c. 126, which is incorporated into stat. 4 G. 4, c. 95. The Judge overruled the objections to the commitment and conviction: but he thought the defendants would be entitled at all events to a verdict by virtue of the section above mentioned, if the jury thought they acted *bonâ fide* under the belief that they were putting in execution the first mentioned act. The jury found, very properly, that they were so; and the verdict passed for them. A new trial was moved for, on objections to both rulings: but the latter was principally discussed on the argument; \*21] and we \*were willing to decide the case on that point, as one of general importance: but, after much consideration and long delay, we have found difficulties in agreeing upon the proper conclusion to come to; and we therefore proceed to the examination of the other point.

The conviction passed on the thirtieth section; and the offence is thus described therein: "shall demand and take a greater or less toll from any person than he shall be authorized to do by virtue of the powers of any act, or of the orders and resolutions of the trustees or commissioners made in pursuance thereof." By the eighty-seventh section it is provided that "no proceeding to be had or taken in pursuance of this act shall be quashed or vacated for want of form."

The warrant stated the offence thus: did "suffer and permit O. C., J. L. and J. P. to pass through the said turnpike gate, with a cart drawn by one horse, on payment of the sum of 4*d.*, as toll for the said cart drawn by one horse, the legal toll due and payable in respect of the said cart drawn by one horse being the sum of 6*d.*, contrary to," &c. It was objected that this disclosed no offence against the statute; for that to *suffer and permit* one to pass on payment of a smaller toll was not to *demand and take it*. It may be doubted, perhaps, whether the words "demand and take" are to be referred severally to the two cases which follow of a greater or less toll, or whether they do not together express the complete act of asking for and receiving: but in either way the word "take" will denote no more than "receive," without any notion of force or compulsion. Nothing bound the magistrate to use the very words of the statute, though it is always better to do so where they in themselves sufficiently describe the offence: \*22] and, giving to the word this sense of simply receiving, we think the language of the commitment quite equivalent. A toll-keeper who suffers a traveller to pass on payment of a smaller toll than the legal one, does in fact ask for and receive that toll.



But it is, perhaps, not necessary to decide this point, because the defect in question, assuming it to be one, is certainly cured by the conviction, if that be itself sustainable; for in that the words of the act are followed; the statement is that he did demand and take, &c.

But then it was urged that both the warrant and the conviction were open to another objection. The statute, it has been seen, prohibits the taking a greater or less toll than the collector "shall be authorized to do by virtue of the powers of any act, or of the orders and resolutions of the trustees or commissioners made in pursuance thereof." The warrant, stating that the toll taken was 4*d.*, adds, "the *legal toll* due and payable," &c. "being the sum of 6*d.*" The conviction describes it thus: "for which said horse, drawing such cart, a certain toll, to wit, the sum of 6*d.*, was then and there payable by," &c., "the said toll or sum of 4*d.*, so demanded and taken by the said J. S. as aforesaid, then and there being a less toll than he, the said J. S., was then and there authorized to take, for the cause aforesaid, by virtue of the powers of any act, or of the orders and resolutions of the trustees or commissioners of the said turnpike road, made in pursuance thereof."

Assuming that it is not enough, as in the warrant, to say that the *legal* toll was 6*d.*, here again it is clear that the conviction, if itself sufficient, will cure the defect. \*The objection to the conviction was not very clearly put: we understood it to be that some reference should [\*23 have been made, on the face of the instrument, to the local act, or the resolution of the trustees which fixed the minimum toll, so that it might have appeared that 6*d.* was that minimum below which the plaintiff could not legally demand and take.

Now it is to be observed that, if a resolution had been set out at length, fixing the toll at 6*d.*, still the nature of the offence described in the act would have required something more in extreme strictness: the description being by negatives extending to any act, or any order or resolution of trustees, it would, in extreme strictness, have been still necessary to negative the existence of any such, because, however strong the words of the resolution set out, there might still be some other resolution, or some other statute, allowing the taking of a less sum under some supposable circumstances, or from some supposable class to which the traveller in question might belong. This consideration seems to show that the objection itself is not well founded, and that, where the offence by the statute is the taking more or less than any statute authorizes, or any resolution of trustees, it is sufficient to state the sum taken, the sum legally payable, and to negative generally that any less sum than that has been sanctioned by statute or resolution. It should seem that it is matter of defence to produce the statute or resolution that does sanction the smaller sum, if there be one that can be produced.

The question really is, whether the statute uses words which sufficient

\*24] ly describe an offence; for the \*conviction has used them, and something more: and we think it does.

Upon these grounds we are of opinion that the learned Judge was right in overruling the objections taken to the conviction, and consequently that the rule for a new trial must be discharged. Rule discharged.

## IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

SOARES against GLYN, Baronet, and Others.

Declaration in assumpsit stated that E. drew a bill of exchange on defendants, payable to order of O.; that defendants accepted; that O. endorsed to "The Treasurer General of the Royal Treasury of Portugal;" and that C., then being the Treasurer General aforesaid, endorsed to plaintiff.

Pleas. 2. That the said Treasurer General of the Royal Treasury of Portugal did not endorse to plaintiff: and issue thereon. 3. That the said Treasurer General, by whom the endorsements were alleged to have been made, *at the time when he endorsed* was not such Treasurer General as was designated and intended by the endorsement of O., but minister of a hostile government, and had no title or authority to endorse: replication, that the Treasurer General who endorsed was the Treasurer General designated, &c. (not adding *at the time, &c.*); and issue thereon.

It was proved that the bills were endorsed for the use of M., then king of Portugal, and received by C., being then, and at the time of the first endorsement, his treasurer; but that, after M.'s government had been subverted by a hostile one, and C. removed from office, C. endorsed.

Held: That C., by the endorsement and delivery to himself, acquired an absolute title to the bills, and a power to endorse, which could not be qualified by any intention of O. not expressed in the endorsement, even if such qualification could be annexed to an endorsement at all; and *seem* that it could not: And that it was immaterial whether C. was Treasurer General at the time of his endorsing over or not, and that the words *at the time, &c.* were therefore properly omitted from the issue taken.

THIS was an action of assumpsit, tried before Lord DENMAN, C. J., at the London sittings after Hilary term, 1843, when a bill of exceptions was filed by the counsel for the plaintiff. Judgment having been given for the defendants in the court of Queen's Bench, error was brought by the plaintiff; and the defendants joined in error. The case was argued \*25] in the Exchequer \*Chamber, in this vacation, (June 13th,) before TINDAL, C. J., COLTMAN, MAULE, and CRESSWELL, Js., and PARKE, ALDERSON, ROLFE, and PLATT, Bs., by *Crowder* for the plaintiff in error, (plaintiff below,) and *Kelly* for the defendants in error, (defendants below.) The material statements on the record and bill of exceptions, and the arguments, appear sufficiently from the judgment.(a) *Cur. adv. vult.*

TINDAL, C. J., in this vacation (July 3d) delivered the judgment of the court.

In this case, which was argued before us at the sittings of this court of error after the last term, the question for our decision is, whether the

(a) The following authorities were referred to in argument: *Glyn v. Soares*, 3 Myl. & K. 450; *Glyn v. Soares*, 1 Y. & C. 644, overruled in *Dom. Proc. Queen of Portugal v. Glyn*, 1 West. Ca. H. L. 258; *Rex v. Box*, 6 Taunt. 325; *Sigourney v. Lloyd*, 8 B. & C. 622.

direction of the Lord Chief Justice of the court of Queen's Bench, given on the trial of the cause, was or was not correct in respect to those points which form the subject of the bill of exceptions.

The charge of the Lord Chief Justice is set out at length upon the record, a course of proceeding which is unusual, and ought not to be adopted. The precise point upon which the summing up is sought to be impugned should have been stated, and so much only of the context as was necessary, if any was necessary, to explain the direction of the Judge, and no more.—The statement of the charge *at length* tends much to embarrass the question, and adds greatly to the expense of the proceedings in error.

In order to understand the nature of the exceptions, \*it will be necessary to state shortly the substance of the pleadings. [\*26

The action was brought upon six bills of exchange, drawn at Paris by the Baron D'Est on the defendants in London, payable to the order of Outrequin and Jauge, and accepted by the defendants. These bills were endorsed by Outrequin and Jauge to “(a) Monsieur The Treasurer General of the Royal Treasury of Portugal:” and the declaration stated that one Joaquim Fernandes Conto, then being the Treasurer General aforesaid, endorsed the said bills to the plaintiff.

To this declaration there were several pleas. First: that Outrequin and Jauge did not endorse to the Treasurer General of the Royal Treasury of Portugal. Secondly: that the said Treasurer General of the Royal Treasury of Portugal did not endorse. Thirdly: that the said Treasurer General, by whom the endorsements are alleged to have been made to the said plaintiff, at the time when he endorsed the same, was not such Treasurer General as was designated and intended by the said endorsement of Outrequin and Jauge, but was another and different functionary, and agent and minister of another, and different, and adverse and hostile, government, and had no title or authority to endorse the bills. There were also two special pleas, stating that Don Miguel, whilst he was King of Portugal, raised a loan at Paris; that Outrequin and Jauge, being bankers at Paris, entered into an agreement with Don Miguel and his government for negotiating and raising the loan, and remitting the same; and that Outrequin and Jauge purchased and procured these bills to be drawn for the purpose of remitting the same on account of the \*said loan; and that, in order to enable Don Miguel and his government to receive payments of the said bills of exchange, they endorsed the said bills to the order of Monsieur the Treasurer General of the Royal Treasury of Portugal, thereby intending and meaning to make them payable to the order of such person as should be for the time being Treasurer General of the Royal Treasury of Portugal by the appointment and as minister of the said Don Miguel and his government, and not of any person appointed by or acting under the authority of any government adverse to

(a) These were the words of the endorsement as set out on the record.

that of Don Miguel; that the said bills were sent to, and duly received by, the said Conto, then being the Treasurer General of the Royal Treasury of Portugal, under and as minister of Don Miguel; that Don Pedro, with a hostile force, took possession of Lisbon, and compelled Don Miguel to quit, and subverted his government; whereupon Conto altogether ceased to exercise the functions of Treasurer General of the Royal Treasury, and from thence has never done any act as minister of Don Miguel; that Don Pedro, and the persons then exercising the functions of government in Portugal, took forcible possession of the bills; and that Conto, fraudulently and in collusion with Don Pedro and the new government, endorsed the said bills for the purpose of enabling Don Pedro and the new government, through the plaintiff, to receive payment of the bills.

The plaintiff, in his replication, joined issue on the first two pleas; and, as to the third plea, he replied that the Treasurer General, by whom the endorsements were made to the plaintiff, was the Treasurer General designated and intended by the endorsement of Outrequin and Jauge; \*28] omitting, however, to include in the \*traverse the statement, in the defendants' plea, that he was so at the time of the endorsement. And with respect to the two other special pleas, the replication avers that the matters of fact therein stated were not true.

On the trial, evidence was given that the bills were endorsed in order to remit a part of a loan raised for the use of Don Miguel at Paris, and were intended to be received or negotiated by his treasurer. When the bills were endorsed and received at Lisbon, the government of Don Miguel continued; and Conto was the Treasurer of the Royal Treasury under his government. In July, the government of Don Miguel was subverted, and his loan not recognised by the government of Donna Maria, which succeeded it; but Conto was retained a short time as Treasurer, and removed on the 7th of August; and, on the 9th August, before the notification of such his removal to him, he endorsed the bills to the plaintiff.

In his summing up, the Lord Chief Justice stated that the description of 'Treasurer of the Kingdom of Portugal' was a description upon which the jury might receive evidence as to the intention of the party who endorsed, whether it meant the Treasurer then in the service of Don Miguel and him alone, or whether it was meant to apply to any other person who should hold the office at any time the bills should be in the Treasury, although a change of government should have taken place in the mean time; and that the defendants were entitled to a verdict if Outrequin and Jauge exclusively looked to Don Miguel as the person whose Treasurer was to receive and endorse those bills: and that, if it was so intended, the Government of Portugal which succeeded, or their servant, had no authority to endorse the bills, so as to convey a title to the plaintiff.

\*29] \*His lordship then said that the question was, whether the intention of Outrequin and Jauge was that the bills should be endorsed to Monsr. Conto, not as Treasurer of the Kingdom of Portugal, but

exclusively as the Treasurer of Don Miguel, and acting in his separate adverse interest; and that the legal title depended on that question, which he submitted to their consideration.

The plaintiff's counsel excepted to this direction, and stated that the Lord Chief Justice ought to have delivered his opinion that, if the jury believed that Conto was Treasurer General of the Royal Treasury at the time of the endorsement to him by Outrequin and Jauge, and that he endorsed to the plaintiff, it was sufficient to entitle the plaintiff to a verdict on the second and third issues: and, further, that no evidence ought to have been left to the jury to show any other intention by the endorsement of Outrequin and Jauge than that which is expressed by the written endorsement itself; and that no evidence ought to be considered by the jury to alter the legal effect of the endorsement, or add to its tenor: and, further, that it was wrong to tell the jury that they ought to find a verdict for *the defendants*, if they thought that Outrequin and Jauge intended that Conto should have power to endorse the bills so long as he should be Treasurer of the Royal Treasury under the Government of Don Miguel and no longer. The jury found a verdict for the defendants on the second and third issues, and for the plaintiff on the first issue and those raised on the other special pleas.

The case was argued at length before us: and we are all of opinion that the direction was not correct in point of law, and that the exception was well founded, and consequently that there must be a venire de novo.

\*Whoever was the Treasurer of the Royal Treasury at the time of the endorsement by Outrequin and Jauge acquired the legal title to the bills. The endorsement "to his order" was in law an endorsement "to him or his order;" and the endorsement does not mean the mere act of writing the name on the bills, but the handing the bills over and the delivery of them to the endorsees also. No question arises here as to the effect of a change of officers between the signature of the endorser and the transmission or delivery to the endorsee. When the actual delivery took place, as well as at the time of the making of the endorsements, Conto was the Treasurer: at both times he was in the same office, and the same service; and, consequently, the legal title to the bills vested in him by the endorsement: and there is nothing in the form of the endorsement which can be construed to revest the title in the endorser, or to restrain the endorsee from endorsing over, in case he ceased to have that office; nor can parol evidence be allowed to engraft such a condition, if indeed such a condition, or qualified power of endorsing, could be allowed by the law merchant: and no authority has been cited to show us that it could. [\*30]

We think, therefore, the direction of the Lord Chief Justice was wrong, in stating that the legal title to the bills in this case depended on the intention of Outrequin and Jauge in using the description of the Treasurer of the Royal Treasury, or upon their intention that the power

of endorsing over should depend upon the continuance of the same office. It was unnecessary to inquire, supposing it were competent to do so, as to their intention in endorsing the bills; for the bills were certainly endorsed and delivered to the proper Treasurer; \*and no parol evidence \*31] would be allowed to defeat his title, or qualify his right to endorse.

Indeed the stress of the argument for the defendants in error was, not that the direction was right in point of law, but that the exception had not exactly pointed out the defect, and it was itself untenable in part; for it was said, that the Chief Justice ought not, as the exception stated he ought, to have told the jury that, if Conto was Treasurer General at the time of the endorsement to him, it was sufficient to entitle the plaintiff to a verdict on both the second and third pleas, though it might be sufficient as to the second.

We think that this objection to the sufficiency of this part of the exception ought not to prevail. Even supposing it to have been wrong as to the third issue, and that the plaintiff was not entitled to a verdict upon that issue, we are of opinion that the residue of the exception (at all events the two latter branches of it) was properly taken. But we also think that, upon the third issue, the direction ought to have been in favour of the plaintiff as stated in the exception; because the averment, that the Treasurer General who endorsed, *at the time he endorsed*, was not such Treasurer General as was designated and intended by Outrequin and Jauge, was not parcel of the issue, but had been left out of it because it was immaterial.

We are therefore of opinion that there must be a

Venire de novo.

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\*32] \*In the Matter of the YSTRADGUNLAIS Tithe Commutation.

Stat. 6 & 7 W. 4, c. 71, s. 45, empowering the Tithe Commissioners to decide any question touching the "boundary of any lands," does not authorize them to settle, by their award, a dispute as to the boundary of parishes.

Nor can they do this under the powers granted by stat. 7 W. 4, & 1 Vict. c. 69, s. 2, even at the request of two-thirds in value of the land-owners, if the boundary of the parishes be also a boundary between counties.

For, by stat. 2 & 3 Vict. c. 62, s. 37, this and the two prior acts are incorporated; and sect. 34, of stat. 2 & 3 Vict. c. 62, forbids the Commissioners to adjudicate on a boundary which divides counties as well as parishes. [But see pp. 43, 58, post.]

If the Commissioners are proceeding to adjudicate on such a boundary; *quære*, whether prohibition lies.

But the court, in such case, made a rule absolute for a prohibition, the Commissioners showing cause and making no objection on this ground.

*Quære*, Whether a parochial agreement for a commutation rent-charge can legally be made and confirmed, under stat. 6 & 7 W. 4, c. 71, ss. 17, 27, &c., while a dispute exists as to the boundary of the parish.

CHILTON, in Trinity term, 1844, obtained a rule calling upon the Tithe Commissioners for England and Wales (upon notice to their secretary) to



show cause why a prohibition should not issue, to prohibit them from making their award in the above matter. In the same term, (a)

Sir *F. Thesiger*, Solicitor General, and Attree, for the Tithe Commissioners, and *E. V. Williams*, for *Capel Hanbury Leigh*, Esq., the person principally interested in the after-mentioned question of boundary, showed cause; and *Chilton* supported the rule. A report of the arguments (b) is rendered unnecessary by the judgment of \*the court, [\*33 which was delivered, in the ensuing vacation, (July 6th, 1844,) by

(a) June 11th, 1844. Before Lord Denman, C. J., Patteson and Williams, Js. The report of this case has been postponed in order that it might appear at the same time with *Re Dent Commutation*, p. 43, post.

(b) The discussion turned principally on the following clauses of the Tithe Commutation Acts.

Stat. 6 & 7 W. 4, c. 71, "for the commutation of tithes in England and Wales," enacts:

Sect. 45. "That if any suit shall be pending touching the right to any tithes, or if there shall be any question as to the existence of any modus or composition real, or prescriptive or customary payment, or any claim of exemption from or non-liability under any circumstances to the payment of any tithes in respect of any lands or any kind of produce, or touching the situation or boundary of any lands, or if any difference shall arise whereby the making of any such award by the commissioners or assistant commissioner shall be hindered, it shall be lawful for the commissioners or assistant commissioner to appoint a time and place in or near the parish for hearing and determining the same; and the decision of the commissioners or assistant commissioner shall be final and conclusive on all persons, subject to the provisions hereinafter contained."

Sect. 95 enacts, "That no order, adjudication, or proceeding made or had by or before the commissioners or any assistant commissioner under the authority of this act, or any proceeding to be had touching any offender against this act, shall be quashed for want of form, or be removed or removable by certiorari, or any other writ or process, into any of His Majesty's Courts of Record at Westminster or elsewhere."

Stat. 7 W. 4, & 1 Vict. c. 69, "to amend an act," &c. (6 & 7 W. 4, c. 71,) enacts:

Sect. 2. "That two-thirds in value of the owners of the lands in any parish or district of which the tithes are to be commuted, and respecting the boundaries of which any dispute or doubt shall arise, may, by writing under their hands or the hands of their agents, signed at a parochial meeting called for that purpose according to the provisions of the said act in the case of a parochial meeting for making a voluntary agreement for the commutation of the tithes of a parish, signify their request to the tithe commissioners that the said commissioners should inquire into and settle such boundaries; and thereupon the said commissioners, or any assistant commissioner specially appointed under their hands and seal for that purpose, shall, by examination of witnesses upon oath," &c. (power given to administer it,) "and also using any other powers contained in the said act, and by such other legal ways and means as they or he shall think proper, inquire into, ascertain, and set out the boundaries of that parish or district." Provisions for public notice, and notice to land owners individually, of the intention so to proceed, and of the result (by publishing a description, &c.) when the boundaries have been ascertained.

Sect. 3. "That any person interested in the judgment or determination of the said commissioners or assistant commissioner respecting the said boundaries, who shall be dissatisfied with such determination, may within six calendar months next after the publication of the said boundaries, by delivering or leaving such description as aforesaid, move the court of Queen's Bench to remove the said judgment by certiorari into the said court, the party making such application giving eight days' notice of such application, and of the matter and ground thereof, in writing, to the said commissioners; and the decision of the said commissioners or assistant commissioner, or, in case of removal as aforesaid, the decision of the said court therein, shall be final and conclusive as to the boundaries of such parish or district for all purposes whatsoever." No certiorari to issue after the lapse of six calendar months; nor "unless the party prosecuting the certiorari shall before allowance thereof enter into a recognisance before one of the justices of the said court, in the sum of 50*l.*, with condition to prosecute the same without wilful delay, and to pay to the said commissioners their full costs and charges within one calendar month after the judgment shall be confirmed, to be taxed," &c.

Sect. 14 enacts "That this act shall be taken to be a part of the said act for the commutation of tithes in England and Wales," (6 & 7 W. 4, c. 71.)



Lord DENMAN, C. J. After stating the nature of the rule, his Lordship proceeded as follows.

34\*] \*This was a rule calling upon the Tithe Commissioners for England and Wales to show cause why a writ of prohibition should not

Stat. 2 & 3 Vict. c. 62, "to explain and amend" stats. 6 & 7 W. 4, c. 71, 7 W. 4, & 1 Vict. c. 69, and 1 & 2 Vict. c. 64, ("an act to facilitate the merger of tithes in land,") after reciting those statutes in the preamble, (sect. 1,) enacts:

Sect. 8. "That, notwithstanding any thing in the said acts or any of them contained, in any case where a parochial agreement for rent charge or for giving land instead of tithes, or any compulsory award, has been duly confirmed by the said commissioners, and it shall appear to them, at any period before the confirmation of the apportionment of such rent charge, that by reason of fraud, or by the omission or insertion through error of the tithes or lands of any party thereto, or of the name of any person, whether as title owner or land owner, who ought, or, as the case may be, who ought not, to have been party thereto, or any other manifest error, that such agreement or award would be unjust, and that if such fraud, omission, insertion, or other manifest error had not occurred, the said commissioners would have come to a different conclusion in respect of such agreement or award, and would have declined to confirm, or would have varied the same previous to such confirmation, it shall be lawful for the said commissioners, if they shall see fit, and in their sole discretion, but not otherwise, by a separate award to rectify such agreement or award in any of the matters aforesaid, in such manner as to them shall seem just; and all the provisions and powers of the recited acts relating to compulsory awards shall be applied in every such case, in respect of the matter so dealt with, in as full a manner as if no such agreement or award had been made, or as if the same were made in respect of a separate district." Proviso: a special recital to be made; and the award to be called a supplemental award in the notice of meeting to hear objections.

Sect. 34 enacts "That in case there shall be any question between any parishes or townships, or between any two or more land owners, touching the boundaries of such parishes or townships, or the lands of such land owners respectively, or if such parishes or townships or land owners shall be desirous of having such boundaries ascertained or a new boundary line defined, it shall be lawful for the said commissioners, or any assistant commissioner, on the application in writing of a majority of not less than two-thirds in number and value of the land owners of such parishes or townships in the case of parochial or township boundaries, or on the like application of such two or more land owners in the case of boundaries between their lands, to deal with any dispute or question concerning such boundaries, and to ascertain, adjust, set out, and define the ancient boundaries between such parishes or townships or the lands of such land owners respectively, or draw and define a new line of boundary, as they may see fit; and in every such case the powers and provisions of the said recited acts and of this act, so far as the same may, in the judgment of the said commissioners or assistant commissioner respectively, be applicable, shall extend and may be applied by them or him to such question; and the boundary line so ascertained or newly defined by the said commissioners or assistant commissioner shall thenceforward be the boundary line of and between such parishes, townships, or lands of such land owners respectively for all purposes whatsoever: Provided always, that nothing in this provision contained shall extend to any boundary or part of a boundary being also the boundary line or part of the boundary line of any county, or to the boundary line of any copyhold or customary land, unless the consent in writing of the lord of the manor whereof such land is holden to such application being dealt with by the said commissioners or assistant commissioner shall have been first sent to them or him for such purpose."

Sect. 35 enacts "That in every case in which any judgment or determination of the commissioners or of any assistant commissioner respecting the boundary of any parish, district, or lands shall have been or shall be removed into the court of Queen's Bench, it shall be lawful for the court to direct the trial of one or more feigned issues upon such points as the court shall think fit," "or determine the same in a summary manner or otherwise to dispose of the question or questions in dispute, and to make such other rules and orders therein as to costs and all other matters as may appear to be just and reasonable."

Sect. 36 empowers the commissioners to make orders as to costs of the parties interested in any inquiry into any boundary which the commissioners are authorized to settle.

Sect. 37 enacts "That this act shall be taken to be a part of the first recited act for the commutation of tithes in England and Wales, and of the secondly recited act for amending the same, and of the said thirdly recited act to facilitate the merger of tithes; and that in the construction of this act, unless there be something in the subject or context repugnant to such

issue, to prohibit them from \*making their award in the matter of the commutation of tithes in the parish of Ystradgunlais, in the county of Brecon. The undisputed facts in this case, as disclosed \*by the affidavits, are, that, in the year 1839, a commutation of tithes of the said parish of Ystradgunlais was entered into by agreement under the authority of \*the said commissioners; and that, in the year 1841, a commutation of tithes of the adjoining parish of Cadoxton, in the county of Glamorgan, took place under a compulsory award of the said Commissioners; and there has existed for some years a dispute(a) as to the boundaries of the said two parishes at those points where they are conterminous with the said counties of Brecon and Glamorgan.

It may be remarked, in passing, that, if such dispute existed before and at the time of the commutation above mentioned in these parishes, it may be doubtful how far that commutation could have been effectual or final \*if the boundaries were unsettled, or, in other words, it was and is uncertain what lands belonged to each. The statement, however, is that such commutation was in fact effected.

It further appears that, in consequence of such dispute, and for settling

construction, the several words used in this act shall have and bear the same interpretation as is given to such words respectively in the said recited acts or either of them."

Stat. 3 & 4 Vict. c. 15, "an act further to explain and amend the acts for the commutation of tithes in England and Wales," recites (sect. 1) certain clauses of stats. 6 & 7 W. 4, c. 71, 7 W. 4, & 1 Vict. c. 69, and 2 & 3 Vict. c. 62; and afterwards enacts as follows:

Sect. 28. "And whereas by the said last-recited act powers are given to the said commissioners or any assistant commissioner, upon the application in writing of not less than two-thirds in number and value of the land owners in any parishes or townships, to set out and define the boundaries of such parishes or townships in manner in the said act provided; and it is expedient to extend such power in manner hereinafter mentioned; be it enacted, that it shall be lawful for the said commissioners, or assistant commissioner, but at the sole discretion of the said commissioners, and only in such manner as they shall see fit and proper, to exercise all and every the powers so given by the said lastly recited act relating to boundaries of parishes or townships, on the application in writing of two-thirds in number and value of the land owners of any one parish, place, or township whose boundary shall be in question, notwithstanding the land owners in the parish, place, or township adjoining such boundary shall not join in such requisition: Provided always, that in every such case the said commissioners or assistant commissioner shall, twenty-one days at least before proceeding to make inquiry and adjudicate on such question of boundary, cause a notice to be sent by the post or otherwise given, addressed to the churchwardens and overseers, and also to the surveyors of the highways of every parish, place, or township adjoining such boundary, of the intention of the said commissioners or assistant commissioner to proceed on the question of such boundary, and shall specify," &c. (further directions as to the notices;) "and the assistant commissioner shall thereupon proceed in all respects, and his proceedings shall be as valid and binding as if the said inquiry had been instituted on the application in writing of two-thirds in number and value, as well of the land owners of the parish, place, or township to which such notice shall have been so sent, as of the parish, place, or township causing such inquiry to be instituted: Provided nevertheless, that upon the application in writing, addressed to the said commissioners during the interval of such twenty-one days, of not less than two-thirds in number and value of the land owners in any parish, place, or township adjoining such boundary, and not being parties to any such application as aforesaid, objecting to the said commissioners or assistant commissioner proceeding under the same in the matter of such boundary, all proceedings which shall have been instituted upon the application of such single parish, place, or township under this act shall forthwith be stayed."

Sect. 29 incorporates this act with the recited acts and with stat. 1 & 2 Vict. c. 64.

(a) See *Evans v. Rees*, 10 A. & E. 151.

the same, the said commissioners in the month of December, 1842, gave notice (a) to the attorneys of the parish of Ystradgunlais of a meeting to be held at the request of the parish of Cadoxton, but at the same time expressing a doubt as to their jurisdiction by reason of a section of one \*39] of the acts to which we \*shall hereafter refer. Against this proceeding of the said commissioners there was a regular protest on behalf of the parish of Ystradgunlais. Meetings, however, were held for the purpose of taking evidence upon the disputed boundaries, but under a continued protest on behalf of the said parish of Ystradgunlais; and, finally, a suspension of the proceedings took place *upon the suggestion of the said commissioners*, in order that the parish of Ystradgunlais might have an opportunity of applying to this court for a prohibition; which has been made accordingly.

It may not be unnecessary to observe that no objection was made at the bar to a writ of prohibition being the remedy in this case, and that it was in truth the form of proceeding suggested (as we have seen) by the commissioners themselves. We have thought it right to say thus much, in order to guard against an inference that we pronounce any opinion upon this point.(b)

We come now to the consideration of the question which has been raised, and (we may add) discussed, by the parties, upon the construction of the acts of parliament, as appears from the correspondence which has passed between them. And the question is whether, under the peculiar circumstances of this case, that is to say, with reference to the relative boundaries of the said parishes and counties, the said commissioners have any authority to proceed with the adjustment of the dispute between the said two parishes. This depends upon the construction of the two

(a) The commissioners intimated to the land and tithe owners, as their opinion, that they could proceed only under stat. 6 & 7 W. 4, c. 71, s. 45, which, they said, "enables them to settle boundary disputes for tithe purposes, without restriction." And they gave a public notice that, on, &c., they would proceed "to hear and determine certain differences which have arisen respecting the boundaries of the parishes of Cadoxton Juxta Neath in the county of Glamorgan, and Ystradgunlais in the county of Brecon, whereby the commutation of the tithes of the said parishes is hindered and obstructed," &c. At the meeting, the assistant commissioner disclaimed interfering in the settlement of the parish boundaries, "for any other purpose than those of tithes," and grounded their authority solely on stat. 6 & 7 W. 4, c. 71, s. 45. It was objected that, even under this clause, they had no authority to proceed, the award having been made and confirmed. The meeting was adjourned, and another notice given, stating that, on May 14th, 1844, the commissioners would proceed "to hear and determine certain disputes and differences which have arisen between the land owners and tithe owners of the parish of Cadoxton Juxta Neath in the county of Glamorgan and the parish of Ystradgunlais in the county of Brecon, touching the boundary lines of the said parishes, whereby the completion of the commutation of the tithes of the said parishes is hindered or obstructed," &c. At that meeting, the solicitor to the land owners stated that he should apply for a prohibition; and the assistant commissioner said that, to give opportunity for doing so, the award of the commissioners would not be published till after term.

An affidavit by the assistant commissioner, in opposition to the rule, stated that the parochial agreements for rent-charge in Cadoxton parish had been confirmed at certain dates mentioned in affidavit on the other side; but that the several apportionments of such rent-charge, necessary to complete the commutation of the tithes, were not yet confirmed, nor the commutations completed.

(b) See *In the Matter of the Appledore Tithe Commutation*, p. 139, post.

sections of the two statutes referred to chiefly in the argument and in the correspondence between the parties : sect. 45 of stat. 6 & 7 W. 4, [\*40 c. 71, and sect. 34 of stat. 2 & 3 Vict. c. 62.

By the former, (6 & 7 W. 4, c. 71, s. 45,) it is enacted “that if any suit shall be pending touching the right to any tithes, or if there shall be any question as to the existence of any modus or composition real, or prescriptive or customary payment,” “or touching the situation or boundary of any lands,”(a) “it shall be lawful for the commissioners, or assistant commissioner, to appoint a time and place in or near the parish for hearing and determining the same ; and the decision of the commissioners or assistant commissioner shall be final and conclusive on all persons ;” subject to certain provisions for questioning the propriety of such decision, which it is not material to specify particularly. Now, upon the fair interpretation of this section, and especially the words “boundary of any lands,” we think that the decision of a disputed boundary of parishes cannot be meant. The words have a sufficient and intelligible meaning without so extending them.

But, if there could have been any doubt upon this point, we consider it to be removed by express provision for “parochial boundaries” in the subsequent statutes of 7 W. 4, & 1 Vict. c. 69, and 2 & 3 Vict. c. 62. The thirty-fourth section of the latter act was \*principally relied [\*41 upon, as showing that the commissioners have no authority further to proceed, and was quoted by themselves as showing that they had no authority except by consent of the parties. It is to the effect (so far as this question is concerned) that, if there shall be any question between any parishes or townships, “or if such parishes or townships” “shall be desirous of having such boundaries ascertained or a new boundary line defined,” the commissioners or assistant commissioner, *on the application of two-thirds of the land owners of such parishes or townships*, may set out the ancient boundary, or define a new line, at their discretion : with a provision, that nothing in the said clause contained “shall extend to any boundary or part of a boundary being also the boundary line or part of the boundary line of any county.” And it is by the thirty-seventh section of this (2 & 3 Vict.) act enacted, that the act shall be taken to be *part* of the original act of 6 & 7 W. 4, c. 71. It is obvious, therefore, that all the provisions of the original and incorporated acts are to be construed together. That being so, and it being stated expressly that the boundary of the two parishes before mentioned is part of the boundary also of the counties of Brecon and Glamorgan, we are of opinion that the authority,

(a) It was contended at the bar, that, under this clause 45 alone, the commissioners had jurisdiction, for that the dispute as to boundary was a “difference” whereby the making an award was hindered ; the apportionment of rent-charge among the landholders (under stat. 6 & 7 W. 4, c. 71, sects. 53, 54, 55, 61, &c.) being essential to the award, and being impracticable while the boundary of the parishes remained uncertain. But it was also suggested that the case was one in which the commissioners might make a supplemental award, under stat. 2 & 3 Vict. c. 62, s. 8, and that sect. 45 of stat. 6 & 7 W. 4, c. 71, would apply in the case of a difference whereby the making of that award might be hindered.

which, under certain circumstances, is given to the commissioners to determine any question of disputed boundary between adjoining parishes, is prohibited in the present case by the very terms of the act itself. And we may add that this appears to have been originally the opinion of the commissioners themselves.

We have mentioned stat. 7 W. 4, & 1 Vict. c. 69, (which is also made  
 \*42] part of the original act of 6 & 7 \*W. 4, c. 71,) because by that a power is first given to the commissioners, under certain circumstances, to decide upon disputed parish boundaries. But, as all the three acts are to be considered as one, and *as in the latter* (2 & 3 Vict. c. 62,) the restriction as to a county boundary is imposed, we do not deem it needful further to notice the provisions of stat. 7 W. 4, & 1 Vict. c. 69. It may be mentioned, however, that in both the latter acts the application of two-thirds of the land owners to the commissioners is required to set them in motion: and we do not perceive it stated on the face of the affidavits that such application has in this instance been made.

Upon the whole, we are of opinion that the rule must be made absolute.

Rule absolute for a prohibition.(a)

(a) See stat. 9 & 10 Vict. c. 73, ss. 16, 20, 21. And see the next case.

\*43] \*In the Matter of the DENT Tithe Commutation.

To a motion for certiorari to bring up the award of an assistant Tithe Commissioner, it is no answer that the award is already in court under certiorari, obtained by another party.

Stat. 6 & 7 W. 4, c. 71, s. 95, took away certiorari in the case of orders and adjudications made by the Tithe Commissioners under that act. Stat. 7 W. 4, & 1 Vict. c. 69, s. 2, empowers the commissioners to settle parish boundaries; and sect. 3 gives a certiorari to any person interested in the judgment *respecting the said boundaries*, who shall be dissatisfied therewith, and enacts that, on removal of such judgment under the writ, the decision of the court thereon shall be final and conclusive *as to the boundaries*. Held, that, on the certiorari thus restored, the court was authorized to consider, not only the merits of the decision as to boundary, but all questions usually discussed on certiorari.

The award of an assistant Tithe Commissioner employed to settle the boundaries of a township on request of the land owners, under stat. 7 W. 4, & 1 Vict. c. 69, s. 2, was quashed, on certiorari, as not sufficiently showing jurisdiction:

1. Because it did not state the district to be one of which the tithes were "to be commuted."
2. Because it stated the request to have been signed, not "at a *parochial* meeting called for that purpose" "according to the provisions of" stat. 6 & 7 W. 4, c. 71, s. 17, (referred to by stat. 7 W. 4, & 1 Vict. c. 69, s. 2,) but only "at a meeting called for that purpose."

In stat. 2 & 3 Vict. c. 62, s. 34, (giving the commissioners power, on requisition, to ascertain old or set out new boundaries,) the proviso "that nothing in this provision" shall extend to any boundary line of a county, or of copyhold without consent of the lord, applies only to the enactments in the same clause. And sect. 37 of stat. 2 & 3 Vict. c. 62, which incorporates it with stat. 7 W. 4, & 1 Vict. c. 69, does not abridge the power given by sect. 2 of the prior act.

Therefore, in a case under stat. 7 W. 4, & 1 Vict. c. 69, s. 2, the commissioners may ascertain the existing boundary of a parish, though it be also that of a county, or of copyhold in a manor, the lord of which does not consent to the inquiry.

An award under that clause can be made only where the tithes are "to be commuted:" and there is no jurisdiction under it if the tithes have been commuted already.

THE following award was made by an assistant Tithe Commissioner.

"To all to whom these presents shall come, I, John Mee Mathew,



barrister at law, send greeting. Whereas, a request in writing, signed by upwards of two-thirds in value of the owners of lands within the township of Dent, in the parish of Sedbergh, and West Riding of the county of York, at a meeting called for that purpose, having been duly forwarded to the Tithe Commissioners for England and Wales, requesting them to inquire into, ascertain and set out the boundaries of the said township of Dent, so far as the said boundaries \*abut upon the higher [44 division of Newby lordship in the township of Ingleton, in the parish of Bentham, in the said county; a place called Mossdale Moor in the township of Hawes, in the parish of Aysgarth, in the said county; the township of Garsdale, in the parish of Sedbergh aforesaid; the township of Middleton, in the parish of Kirkby Lonsdale, in the county of Westmoreland; the township of Barbon, in the parish of Kirkby Lonsdale aforesaid; and the township of Sedbergh aforesaid; I the said John Mee Mathew, by an instrument in writing under the hands and seal of the Tithe Commissioners for England and Wales, in pursuance of the power to that effect given to them under and by virtue of an act of parliament, made and passed in the 1st year of the reign of her present majesty, entitled "An Act to amend an Act for the Commutation of Tithes in England and Wales,"(a) was duly appointed to make such inquiry and to set out such boundaries aforesaid: And whereas I have caused to be served all such notices, and to be inserted all such advertisements, as are directed by the said act of parliament, and have held divers meetings and duly examined upon oath all witnesses produced before me, and entered into a full investigation of all matters and things touching the lines of boundary so in dispute as aforesaid: Now know ye that I, the said John Mee Mathew, do hereby adjudge and determine that the boundary line of the said township of Dent, so far as the same abuts upon or adjoins to the said higher division of Newby, commences at," &c., "and proceeds," &c. (describing the course of the boundary line from point to point.) \*45 "All which said boundary is more particularly delineated by the black dotted line in the map or plan hereto annexed, marked," &c. "And I do further adjudge and determine that the boundary line of the said township of Dent, so far as the same abuts upon or adjoins to the said place called Mossdale Moor, commences." &c. (The award then set out, as before, the boundaries where the township abutted upon the other places mentioned in the written request.) "In testimony whereof, I, the said John Mee Matthew, have hereunto set my hand, this 19th day of August, A. D. 1844."

(Signed) "J. MEE MATHEW."

In Hilary term, (January 13th,) 1845, *Hugh Hill*, on behalf of James William Farrer, Esq. and Oliver Farrer, Esq., joint lords of the customary manor of Newby in Yorkshire, obtained a rule calling upon the Tithe Commissioners to show cause why a certiorari should not issue,

(a) The title of stat. 7 W. 4, & 1 Vict. c. 69.

directed to them, to remove into this court the judgment or determination made by the said Assistant Tithe Commissioner respecting the boundaries of the township of Dent in the parish, &c., so far as the said boundaries abut upon the higher division of Newby lordship, &c., a place called Mossdale Moor, &c., the township of Garsdale, &c., the township of Middleton, &c., the township of Barbon, &c., and the township of Sedbergh aforesaid. In the same term (January 31st) *H. Hill* obtained a rule to the same effect on behalf of Dr. James Philip Kay Shuttleworth, lord of the customary manor of Barbon, and owner of land and common of pasture adjoining the line of boundary set out by the Assistant Commissioner. The notices of motion (under stat. 7 W. 4, & 1 Vict. c. 69, s. 3) \*specified numerous grounds of objection. The material  
 \*46] ones will be stated in the argument.

Affidavits were filed in opposition to the rules, on behalf of various parties interested: and in one of these affidavits, (dated April 7th, 1845,) it was stated by a clerk to the attorney for the Commissioners that they had already been served with a certiorari, dated November 25th, 1844, on behalf of William Moore, Esq., commanding them to send the said judgment or determination into this court; and that they had, on 3d April, 1845, returned it accordingly. And the deponent stated that he verily believed, and had no doubt, that the judgment or determination referred to was the same as that mentioned in the rule of January 13th.

In Easter term, (May 7th,) 1845, (a)

Sir *F. Thesiger*, Solicitor-General, showed cause against the first mentioned rule, and contended that the writ could not issue, the award being already in court under a certiorari granted before any of the present rules nisi. Stat. 7 W. 4, & 1 Vict. c. 69, s. 3, (b) enables "any person," but not every person, interested to move for a certiorari. [Lord DENMAN, C. J. For the purpose of moving to quash the award when brought up, a second certiorari cannot be necessary.]

*Watson* and *H. Hill*, for Messrs. Farrer. The parties moving wish at least to have it certified that the award in court is the same as that which they are disputing. [Lord DENMAN, C. J. (after conferring with the  
 \*47] officers \*on the crown side of the court.) The proceedings of the several parties moving may be entirely distinct. The award has been brought up under the recognisances of those who moved for the rule. They ought not to be subject to the costs of all the proceedings. Sir *F. Thesiger*, Solicitor-General. Stat. 2 & 3 Vict. c. 62, s. 35, authorizes the court to make such rules and orders as to costs as may appear just and reasonable.]

Lord DENMAN, C. J. I do not see how we can do otherwise, under the circumstances, than make the rule absolute. The only object is to

(a) Before Lord Denman, C. J., Patteson, and Williams, and Wightman, Js.

(b) All the most material clauses of the Tithe Commutation Acts, referred to in this case, will be found in the notes, p. 32, to p. 37, ante.

identify the award. If the parties are willing, on a formal certificate, to assume that the award is in court, we may proceed on the argument without any further actual return.

*Watson*, in support of the rule, said that the parties for whom he appeared wished only that the identity should be certified.

LORD DENMAN, C. J. Then we will proceed to hear the argument on the validity of the award.

Sir *F. Thesiger*, Solicitor-General, and *Buller*, for the Commissioners, and *Baines* and *Cowling* for the land-owners of Dent, were then heard in support of the award against the objections raised by Messrs. Farrer; and *Watson* and *H. Hill* on the other side: and, in the next term,<sup>(a)</sup> Sir *F. Thesiger*, Solicitor-General, and *Buller*, for the Commissioners, and *Dundas* and *Addison* \*for the land owners of Dent, supported the award against the objections raised by Dr. Shuttleworth; and *Martin* and *Hugh Hill* were heard on the other side. [\*48]

Arguments in support of the award. First: on a certiorari the award cannot be impeached upon any other ground than in respect of the boundaries set out. Stat. 6 & 7 W. 4, c. 71, s. 95, enacted "that no order, adjudication, or proceeding" of the Commissioners or Assistant Commissioner under the authority of that act should "be removed or removable by certiorari." The next statute, 7 W. 4, & 1 Vict. c. 69, (incorporated with the preceding act by sect. 14,) gives, by sect. 3, a certiorari; but the power under it must depend wholly upon the words of that clause; and the writ is given to "any person interested in the judgment," &c. "respecting the said boundaries;" and the decision thereon is made final and conclusive "as to the boundaries of such parish or district." The effect is, that, on this point, the court of Queen's Bench is made a court of appeal from the commissioners on the merits; but the appeal can be on no point which was not actually before the Assistant Commissioner. As to this, *Earl of Stamford v. Dunbar*, 12 M. & W. 414, decided upon stat. 6 & 7 W. 4, c. 71, ss. 45, 46, is an analogous case. The judgment here, from which the appeal is given, is the setting out of the boundary; and the statute was manifestly intended to exclude questions of form, unless they directly grow out of that. [PATTESON, J. Probably the framers of the act did not know what a certiorari meant, and thought only of giving an appeal. But, if a certiorari lies, the question \*is, whether all points usually raised on certiorari are not open.] [\*49]

As to the objections on the face of the award. If the instrument clearly showed that the Commissioner acted without jurisdiction, it would no doubt be void; but it is not so merely because the Commissioner does not set out all the facts which give jurisdiction. This is necessary in warrants and orders of justices, but not in an adjudication under stat. 7 W. 4, & 1 Vict. c. 69, s. 2, which does not require the Commissioner

(a) May, 26th. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Ja.



to make a formal order, but only, by such legal ways and means as are there pointed out, to “inquire into, ascertain, and set out the boundaries” of the parish or district, and to publish a description of them, in the manner there prescribed, when set out. It would be sufficient if he did nothing more. To show jurisdiction in the manner contended for on the other side, the Assistant Commissioner must state facts which he neither knows nor can inquire into; an argument which was urged before the court of Exchequer Chamber in *Taylor v. Clemson*, 2 Q. B. 978, 1012, 1013.

But the particular objections, if admissible, are not valid. (a) It is alleged, first, that the township of Dent is not shown by the judgment to be a parish or district within the meaning of stat. 7 W. 4, & 1 Vict. c. 69. But sect. 12 of stat. 6 & 7 W. 4, c. 71, (which is incorporated with the subsequent statute,) enacts that, “in the construction and for the purposes of this act,” “the word ‘parish’ and ‘parochial’” “shall \*50] mean and include and extend to every parish and every extra parochial place, and every township or village, within which overseers” are separately appointed under stat. 13 & 14 Car. 2, c. 12. Secondly, it is objected that it does not appear by the award that the tithes of Dent township were “to be commuted,” which, by stat. 7 W. 4, & 1 Vict. c. 69, s. 2, is a fact necessary to give the Commissioners jurisdiction. But it is sufficiently clear that these tithes had not been commuted; at least there is no affidavit that they had; and the statute contemplates that all which have not been commuted “are to be” so. The defect, if it be one, amounts only to an imperfect recital of the authority; and that does not vitiate an award; Wats. Arbitr. p. 129, 130, 3d ed. Thirdly, it is said that the award does not show any dispute depending as to the boundaries, which is also a requisite under the last-cited section. But the request of the land-owners of itself implies a dispute existing. Fourthly, it is objected that the award states only a request signed “at a meeting called for that purpose,” whereas sect. 2 requires a “parochial” meeting called for that purpose. But a meeting of two-thirds in value of the land-owners must have been a township meeting; and that, according to stat. 6 & 7 W. 4, c. 71, s. 12, would be a parochial meeting. Fifthly, it is said that the award does not show a request, in the words of stat. 7 W. 4, & 1 Vict. c. 69, s. 2, that the Commissioners should inquire into “and settle” the boundaries. But this is frivolous. The request stated is that they would “inquire into, ascertain, and set out” the boundaries. The words are equivalent to those insisted upon; and the Commissioners could not have declined acting on such a request.

\*51] \*The preceding objections arise on the face of the award, and assume it to be made under stat. 7 W. 4, & 1 Vict. c. 69. But

(a) The argument is reported as to those objections only which were noticed in the judgment of the court; and they are numbered in the order in which they were discussed at the bar, omitting several which were not particularly adverted to.

there are others, raised by affidavit, and depending on the supposition that the award is subject to the provisions of stats. 2 & 3 Vict. c. 62, and 3 & 4 Vict. c. 15. These (in the case of Messrs. Farrer) are: "That the boundary line of the said township of Dent, so far as the same abuts upon or adjoins to the said higher division of Newby, is also the boundary line of the customary land held of the lords of the manor of Newby, and that no consent in writing of the lords of the said manor of Newby to any application being dealt with by the said Commissioners or Assistant Commissioner was sent to them or him for any purpose whatsoever." And "That part of the boundary of the said township of Dent was also part of the boundary of the county of York." Similar objections are taken in the case of Dr. Shuttleworth. But this award is made under the powers given by stats. 6 & 7 W. 4, c. 71, and 7 W. 4, & 1 Vict. c. 69, which latter act it recites. The former act (sect. 45) authorized the Commissioners, without request, to determine "any question" "touching the situation or boundary of any lands:" the subsequent act enables them, upon request by two-thirds in value of the land-owners, to inquire into, ascertain and set out the boundaries of any parish or district of which the tithes are to be commuted, &c. Under these acts nothing more was done than to trace out ancient boundaries. But stat. 2 & 3 Vict. c. 62, s. 34, and stat. 3 & 4 Vict. c. 15, s. 28, gave power, on application as stated in those clauses, to mark out a new boundary line: and it became necessary to restrict that power by requiring the \*consent of lords of manors where their boundaries were touched, and by prohibiting any interference with the boundaries of counties; a restraint not imposed, nor necessary in the former act, which gave no power to make new boundaries. Here the award does not profess to change any boundary: and the Assistant Commissioner deposes that he did not intend to make, nor did in fact make, any such change.<sup>(a)</sup> The argument on the other side would enable a single lord of a manor to nullify the request of two-thirds of the land-owners, though desiring only to have their ancient boundary ascertained. [\*52]

The case *Re Ystradgunlais Commutation*, p. 32, *antè*, will perhaps not be upheld on further consideration. The arguments now urged were not there brought sufficiently before the court. It is true that stat. 2 & 3 Vict. c. 62, is, by sect. 37, incorporated with the two earliest Commutation acts; but the first proviso in sect. 34 of that act does not extend beyond the section itself; for the words are, that nothing "in this provision contained" shall extend to any boundary of copyhold or customary land (unless, &c.) or of a county: that clause cannot therefore qualify the enactments of stat. 7 W. 4, & 1 Vict. c. 69, s. 2, under which the

(a) Mr. Mathew made affidavits in opposition to the rule in Messrs. Farrer's and Dr. Shuttleworth's cases respectively, and stated in each, "that, in making his award, he had no intention of setting out a new boundary, and that the boundaries set out by him are, to the best of his judgment and belief, the ancient boundaries of the township of Dent, as proved by the evidence given before him."

away the power where the boundaries of parishes are also the boundaries of counties, extends only by its very words to the power given by that *clause*; for the words are, “nothing in *this provision* contained.” It is true that sect. 37 incorporates the act with the former acts: and the question therefore is, whether, assuming the whole to be one act, the second section of stat. 7 W. 4, & 1 Vict. c. 69, and the thirty-fourth section of stat. 2 & 3 Vict. c. 62, can both be in operation separately and independently. Now the alteration made by the 28th section of stat. 3 & 4 Vict. c. 15, is expressly confined to stat. 2 & 3 Vict. c. 62, s. 34, and does not affect the second section of 7 W. 4, & 1 Vict. c. 69, and this is material to the argument; for stat. 2 & 3 Vict. wanted alteration in regard to its requiring the assent of *both* parishes, but stat. 7 W. 4, & 1 Vict. \*57] did not require such assent, and wanted no \*alteration in that respect. But, if the legislature had intended to incorporate the sections of stat. 7 W. 4, & 1 Vict. c. 69, and of stat. 2 & 3 Vict. c. 62, so as to make them one enactment, surely they would have noticed both the sections in the 28th section of stat. 3 & 4 Vict. c. 15; for then *both* would have wanted alteration; unless indeed it be taken that the 34th section of stat. 2 & 3 Vict. c. 62, although it contains *no words* of repeal, *necessarily* repeals altogether the 2d section of stat. 7 W. 4, & 1 Vict. c. 69, which is hardly contended for. Now we think that both sections may be in operation separately and independently, even if taken as part of one act. The second section of stat. 7 W. 4, & 1 Vict. c. 69, will apply to cases where the parish wishes only to ascertain and set out the old and existing boundary: the 34th section of stat. 2 & 3 Vict. c. 62, will apply to cases where the parish wishes to give the Commissioners the option of ascertaining and setting out the old and existing boundary, or of drawing and defining a new boundary, as they shall think fit. In the former case notice is to be given to adjoining parishes; but they are not required to join in the application; nor is any provision made for their dissenting and stopping the proceedings; nor is any restriction imposed in regard to the boundaries of counties and manors. In the latter case, where a *new* boundary may be drawn and defined, though the adjoining parishes are not required to join in the application, yet, if they dissent within twenty-one days after notice, the proceedings are stopped, and the restrictions respecting boundaries of counties and manors are introduced. Perhaps the distinction as to ascertaining and setting out the old and existing \*58] boundary and \*drawing and defining a new boundary may in many instances be of little importance; but in others it may be far otherwise; and the legislature appears to have made the distinction upon which we ought to act: added to which, if the two sections are entirely blended together, it would seem that the Commissioners might in their discretion set out a *new* boundary, although the parish may not have requested them to do so, which could hardly have been intended.

Has, then, the Commissioner in the present case drawn and defined a

*new* line of boundary? If he has, it is clear that the award is without jurisdiction as regards the parts where county boundaries and manor boundaries occur. But the Commissioner has sworn positively that he had no intention of drawing or defining a *new* boundary, and that he has ascertained and set out the *old* one according to the evidence, to the best of his judgment. The award professes to proceed entirely on stat. 7 W. 4, & 1 Vict. c. 69, to which act only it refers by the year and by its title (that of the 2 & 3 Vict. having a different title;) and the Commissioner, by the very language of the award, ascertains an existing boundary, not defines a new one; for he says: "I" "adjudge and determine that the boundary line" "commences," &c.: all in the present tense; not using the words "shall henceforth," or any words of future signification. We think therefore that this must be considered to be an award under the 7 W. 4, & 1 Vict., and that the objection as to county and manor boundaries cannot prevail.

We were referred to the case of *Re Ystradgunlais Commutation*, in which, undoubtedly, the view we now \*take of the statutes was not suggested in argument, nor did it occur to the court, and the judgment proceeded on a contrary view. We think that view wrong: but it is to be observed that there was another objection in that case, viz., that it appeared that the tithes of both parishes had been commuted *before* the application was made to the Commissioners: it was, therefore, not a case within stat. 7 W. 4, & 1 Vict. c. 69, where the words are "*to be* commuted;" and, as the award could not stand under stat. 2 & 3 Vict. c. 62, the judgment in that case is substantially right. [59]

It remains to dispose of other objections made in the present case on the supposition that the award is under stat. 7 W. 4, & 1 Vict. c. 69. Those who support the award, however, contend that these objections cannot be entertained by this court, inasmuch as the writ of certiorari is taken away by the original act 6 & 7 W. 4, c. 71, s. 95, and is given, by the third section of stat. 7 W. 4, & 1 Vict. c. 69, only where a party interested is dissatisfied with the judgment or determination of the Commissioners as to the boundary; that is as to the proper boundary having been set out; and that this court can only enter into the merits and review the decision upon evidence, and cannot consider any defects on the face of the award. The practice of this court is directly the reverse in all cases of writs of certiorari: and, although we see plainly that the legislature has in this statute given a further effect to the writ of certiorari, and made us a court of appeal upon the merits, yet we do not see any words which take away the proper jurisdiction which we have when the writ of certiorari lies, namely, to examine the proceedings below, and decide whether they be good or bad upon the face of them. We think \*therefore, that we must consider any defects said to appear upon the face of this award. [\*60]

The first objection is, that it does not appear that the township of Dent

was a parish or district within the statute. The interpretation clause, sect. 12, of stat. 6 & 7 W. 4, c. 71, with which act stat. 7 W. 4, & 1 Vict. c. 69, is incorporated, is a sufficient answer, which enacts that the word "parish" shall include "township."

The second objection is, that it does not appear that the tithes were "*to be commuted*;" that, consistently with all that appears on the face of the award, the tithes may have been commuted before the application made by the parish respecting the boundaries, in which case the Commissioners would have no jurisdiction. We feel ourselves obliged to yield to this objection. The power given by the second section of stat. 7 W. 4, & 1 Vict. c. 69, seems manifestly to have been given with a view to facilitate the final settlement of the tithes in each parish, and to have been intended to be exercised before the tithes are commuted. The words are "of which the tithes are to be commuted." It is therefore necessary to the jurisdiction of the Commissioner to show on the face of the award that the tithes remained *to be commuted*; and this is the more necessary under the section in question, because the adjoining parishes and townships which now object have no right to stop the proceedings, as they have under stat. 3 & 4 Vict. c. 15.

The third objection is, that it does not appear that any dispute about the boundaries has arisen. This we think quite frivolous: it does appear on the face of the whole award distinctly.

\*61] The fourth objection is, that it does not appear that the meeting at which the request was signed was a parochial meeting called according to the provisions of the act 6 & 7 W. 4, c. 71. This appears to us to be a fatal objection. The second section of stat. 7 W. 4, & 1 Vict. c. 69, expressly requires that such meeting should be so called; but the award alleges only that the request was signed by upwards of two-thirds in value of the owners of lands in the township of Dent in the parish of Sedbergh, at "*a meeting called for that purpose*:" how called does not appear.

The fifth objection is, that it does not appear that the request to the Commissioners was to inquire into *and settle* the boundaries. This is entirely frivolous. The second section indeed says that the request shall be to "inquire into and *settle*" the boundaries; but it goes on to enact that thereupon the Commissioners shall "inquire into, ascertain, and set out the boundaries," manifestly meaning the same thing; and the request is to "inquire into, ascertain and set out;" that is, to do the very thing which the act of parliament says that the Commissioners shall do on request.

Upon the whole, we are of opinion that this award must be quashed upon the second and fourth grounds of objection.

Rules absolute for quashing the award.

**CASES**  
**ARGUED AND DETERMINED**  
**IN**  
**THE QUEEN'S BENCH,**  
**IN**  
**Michaelmas Term and Vacation,**

**IX. VICTORIA.**

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The Judges who usually sat in banc in this Term and Vacation, were

Lord DENMAN, C. J.

COLERIDGE, J.

WILLIAMS, J.

WIGHTMAN, J.

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**MEMORANDA.**

SIR WILLIAM WEBB FOLLETT, her majesty's Attorney-General, died in last Trinity vacation.

Sir *Frederick Thesiger*, her majesty's Solicitor-General, was promoted to the office of Attorney-General: and

*Fitzroy Kelly*, Esq., one of her majesty's counsel, was promoted to the office of Solicitor-General. He afterwards received the honour of Knighthood.

In the same vacation,

Mr. Serjt. *Shee* received a patent of precedence, to rank next after *William Page Wood*, Esq., one of her majesty's counsel:

\**Montagu Chambers*, of Lincoln's Inn, Esq., was appointed one of her majesty's counsel. And [\*63]

*Robert Allen*, of Gray's Inn, Esq., was called to the degree of Serjeant at law, (according to stat. 6 G. 4, c. 95,) and gave rings with the motto, "*Hic, per tot casus.*"



## DOE on demises of PETER HOPLEY against YOUNG.

*Tuesday, November 4th.*

The fact, that a party did a particular act (as signing a land-tax assessment) in an official capacity, may be proved, not only by showing that he exercised the office before or at the period in question, but also by evidence (limited to a reasonable time) of his having exercised it afterwards.

EJECTMENT for premises in the parish of St. James in Bury St. Edmunds, Suffolk. On the trial, before WILLIAMS, J., at the last Suffolk assizes, the lessor of the plaintiff, to prove seisin in Anne Hopley, under whom he claimed, put in certain assessments by the Commissioners of land-tax. To prove the signature of certain Commissioners, a witness was called, who deposed to the handwriting, and stated that the document had passed through the office of the Commissioners; and there was evidence that the parties named had acted as Commissioners; but this proof referred only to a time after the date of the signature; and there was no evidence of the parties having acted as Commissioners before. It was objected that, without such proof, the evidence could not be received. The learned Judge admitted it; and the plaintiff had a verdict.

*Gunning* now moved for a new trial, and contended that the signature was not sufficiently proved to go to the jury, unless the party were shown to have been a Commissioner at or before the time of signing. [Lord \*64] *DENMAN*, C. J. When we have the handwriting of a person proved to have been a Commissioner, is there any authority for requiring proof of his having acted as Commissioner at the time when he signed? If he is shown to have been a Commissioner within a reasonable time from the signature, there is surely no ground of objection.] *Gunning* also took an objection as to the effect of the entry proved; citing *Doe dem. Strode v. Seaton*, 2 A. & E. 171, and *Doe dem. Stansbury v. Arkwright*, 2 A. & E. 182, note (a); and contended that the evidence at most only proved Anne Hopley to have been occupier. [*COLERIDGE*, J. That would be *prima facie* evidence of seisin.]

*LORD DENMAN*, C. J. Most of the remarks on this case turn only on the effect of the evidence. On the question, whether it was receivable or not, I have no doubt. When persons who have exercised a public duty are shown to have done an act within the scope of that duty at a particular time, we may assume that they were exercising the public duty when they did the act, without proof that they were or had been discharging such duty at the very time. If it was within a reasonable time of the act done, that is sufficient.

*WILLIAMS*, J., concurred.

*COLERIDGE*, J. It is an admitted point that acting in an office is proof of being officer; and that rule clearly takes effect in favour of an act done after the time to which the proof relates. But the same principle applies

\*when that time is subsequent to the act done. The inference [ \*65  
may be carried upwards as well as downwards.

WIGHTMAN, J., concurred.

Rule refused.

The Mayor, Aldermen and Burgesses of LICHFIELD against SIMPSON.  
*Tuesday, November 11th.*

**Case.** Declaration stated that defendant, after 9th of November, 1835, and after the first election of councillors under stat. 5 & 6 W. 4, c. 76, was appointed and acted as town clerk of the borough of L., and continued to be and act as such town clerk, until the expiration of his office by his lawful removal; that, after such removal, and within three months after the expiration of defendant's office, the council of the borough, in pursuance of the statute, duly authorized and appointed A. to receive from defendant, and required defendant to deliver to A. a true account in writing of all matters committed to defendant's charge as such town clerk by virtue of the act, and also of all moneys, &c., together with proper vouchers, &c., and also a list of the names of debtors, &c.; of which premises defendant, within the three months, had notice, and was, within the three months, required by A., pursuant to the authority, to deliver to A. the said matters and things which A. was so authorized to receive; that, since defendant had such notice, &c., and within the three months, a reasonable time for the delivery had elapsed; that, before the expiration of defendant's office, to wit, on, &c., divers matters and things were committed to his charge under the act, and for the corporation, viz. certain deeds, &c.; that, during the time aforesaid, defendant received moneys amounting, &c., by virtue and for the purposes of the act, and had not tendered any account thereof to plaintiffs; and that, before and at the expiration of defendant's office, there were divers persons from whom moneys were due for the purposes of the act, which ought to have been received and accounted for to plaintiffs by defendant, but who had not paid the same: Breach, that, though it was defendant's duty to deliver the said matters and things to A., and A. all the time continued to be authorized to receive them, defendant had not delivered them to A.; by means whereof plaintiffs were kept in ignorance of matters which ought to have been contained in the account, list and vouchers, and had been prevented from obtaining moneys which they might have obtained if defendant had performed his said duty, and from carrying on the business of the corporation, &c.

**Held,** on special demurrer, that an action on the case for the breach of duty lay against the defendant, and that plaintiffs were not restricted to the summary remedy, under stat. 5 & 6 W. 4, c. 76, s. 60, before justices of the peace. And that the appointment of A. to receive the several matters and things, and the duty of defendant to deliver them, were sufficiently alleged.

THE declaration contained two counts: the first in trover, for books and documents; the second count was in case, and stated, that, whereas, after the passing of stat. 5 & 6 W. 4, c. 76, and after 9th \*November, 1835, and after the first election of councillors for the borough [ \*66  
of Lichfield under the statute, and before the committing of the grievances, to wit, on, &c., defendant, being then a fit person in that behalf, and not being at the time of his appointment thereafter mentioned a member of the council of the borough, had been and was duly appointed and constituted town clerk of the borough, and continued to be, and was, and acted as, such town clerk until, afterwards, to wit, on, &c., the defendant's office of town clerk expired and determined by his due and lawful removal from his said office by the council of the borough pursuant to the statute; and whereas, after the removal, &c., and after the office had so determined and expired, and within three months after the said office had expired, &c., to wit, on, &c., the council, in pursuance of the statute, duly au-



thorized and appointed Alfred Egginton to receive from defendant, and required defendant to deliver to the said A. E., a true account in writing of all matters committed to defendant's charge as such town clerk by virtue of the said act, and also of all moneys which had been by him received by virtue or for the purposes of the said act, and how much thereof had been paid and disbursed, and for what purposes, together with proper vouchers for such payments, and also a list of the names of all such persons as should not have paid the moneys due from them for the purposes of the said act, and of the amount due from each of them; of all which premises the defendant afterwards, within three months after the expiration of his said office, to wit, on, &c., had notice, and was then, and within the said three months, required by the said A. E., in pursuance of the

\*67] authority so given to him as aforesaid, to deliver to A. E. the \*said several matters and things which A. E. was so authorized to receive from him as aforesaid, (that is to say,) the aforesaid accounts, vouchers and list: averments that, since defendant had such notice and was so required as aforesaid, and within three months after the expiration of the office of defendant as aforesaid, to wit, on, &c., a reasonable time for delivering the said several matters, &c. expired and elapsed; and that, before the time of the expiration of the office of defendant as aforesaid, to wit, on, &c., and on divers other days between that day and the commencement of this action, divers matters and things had been and were committed to the charge of defendant under and by virtue of the said act, and for and in behalf of the said corporation, that is to say, certain charters, deeds, &c., of the said borough; and that defendant during the time aforesaid received divers moneys amounting, &c., by virtue and for the purposes of the said act, of which, or of any part thereof, defendant had not at any of the times in that count mentioned, or at any time before the commencement of the action, tendered any account whatever to the plaintiffs, or any person for them or on their behalf; that there were, before and at the time of the expiration, &c., and from thence until and at the several times in that count mentioned, and from thence until and at the time of the commencement of this action, divers persons from whom moneys were due for the purposes of the said act, and which moneys ought to have been received and accounted for to the plaintiffs by defendant, which persons had not paid the same; and that more than three months expired and elapsed after the expiration, &c., and before the commencement of this action, to wit, on, &c: and that, though it was defendant's duty, by

\*68] \*reason of the premises, to have delivered to the said A. E. the said matters and things which he was so authorized to receive from him, and though the said A. E. had during all the time aforesaid continued to be authorized to receive the said several matters and things which he was so authorized to receive as aforesaid, and had been during all that time ready and willing to receive the same, yet defendant, not regarding, &c., did not nor would, although thereunto, to wit, on, &c., requested,

deliver the said matters and things which A. E. was so authorized to receive from him as aforesaid, or any of them, to the said A. E. or to the plaintiffs, but continually until the commencement of this action, wilfully neglected so to do, and had not delivered, but on the contrary had wilfully neglected to deliver to A. E. any such account, list or vouchers as in that count aforesaid; contrary to the statute; by means whereof the plaintiffs had been kept in ignorance of the matters and things which ought to have been contained in the said account, list and vouchers respectively, and had been prevented from obtaining and receiving divers moneys and property due and belonging to plaintiffs, which they would have been enabled to obtain and receive if defendant had performed his aforesaid duty; and had been for a long space of time, to wit, till the commencement of that suit, prevented from carrying on and transacting the affairs and business of the said corporation as they might and otherwise would have done, and had been otherwise greatly injured, &c.

Special demurrer to the last count, stating, amongst other causes of demurrer, first, that a special action on the case for not delivering such account, &c. is \*not given by statute, nor by the common law, but [\*69 the proper remedy is by a summary application, pursuant to sect. 60, or by an action of account, (where such action can be lawfully maintained,) or by a special action for not accounting pursuant to some contract or promise of the defendant to that effect, which was not alleged, or by an action founded upon some security for the due execution of the office, pursuant to sect. 58, or by some other collateral action not founded upon sect. 60; secondly, that the count did not state how or in what manner, A. Egginton was authorized and appointed as alleged, nor whether he was so authorized and appointed by writing, under the hands of any three or more of the said council, or under the common seal of the plaintiffs, or how otherwise, nor that the council ever gave any directions, pursuant to sect. 60, as to the manner in which defendant should deliver the said account, *e. g.* as to time, place, form or otherwise, nor that any such matters or things as in that count mentioned had been or were committed to the charge of defendant as town clerk of the borough, nor that defendant, as such town clerk, ever received any such moneys. Joinder in demurrer.

*W. R. Cole*, for the defendant. The defendant is charged with omitting to do that which it was not his duty to do, unless under stat. 5 & 6 W. 4, c. 76, s. 60.(a) That \*section, after providing that every [\*70 town clerk shall, during the continuance, or within three months

(a) Stat. 5 & 6 W. 4, c. 76, s. 60, enacts that every town clerk, &c., shall within three months after the expiration of his office, and in such manner as the council shall direct, deliver to the council an account of matters committed to his charge, and of moneys received by him by virtue of this act, and disbursements thereof, with vouchers, and a list of persons not having paid moneys due from them for the purposes of the act, &c., and shall pay over the moneys, &c.; and, if any such officer shall refuse or wilfully neglect to deliver such account, or the vouchers, &c., or such list as aforesaid, or to make payment as aforesaid, or shall refuse or wilfully neglect to deliver to the said council, &c., within three days after notice as

after the expiration of his office, and in such manner as the council shall direct, deliver to the council a true account in writing of all matters committed to his charge by virtue of that act, and of certain moneys and vouchers, and a list of defaulters, gives a summary remedy before justices of the peace in case of the refusal or wilful neglect of any such officer so to do, provided "that nothing in this act contained shall prevent or abridge  
\*71] any remedy by action against any such officer so offending as afore-

said, or against any surety for any such officer, but such officer shall not be sued by action and also proceeded against in a summary manner by virtue of this act for the same cause." The power to appoint and remove the town clerk and other officers is given to the council by sect. 58; and sect. 65 gives the council authority to remove officers who were in office at the time of the first election of councillors under the statute; and enacts that "every officer who shall be in possession or receipt of any moneys, goods, valuable securities, books, and papers belonging to or concerning the body corporate whose officer he is, shall deliver up and account for the same to the council;" "and the council shall have the same remedy against such officer to recover the same as is hereinbefore provided in the case of officers appointed by such council."

In *Baylis v. Strickland*, 1 M. & G. 591, it was held that sect. 65 virtually incorporated the whole course of proceeding pointed out by sect. 60, so that justices of the peace had jurisdiction, on an information laid by the mayor against a person who had been crier to the corporation before the passing of the act, but had been removed from the office by the council under the act, to convict the defendant for neglecting to deliver up the corporation bell to the town clerk, who was authorized by the council to receive the same; and in the case *In the matter of the Justices of Gateshead*, 6 A. & E. 550, note (a), it was held that the justices for the county have this jurisdiction as well as the justices for the borough. In this case, therefore, there being no circumstances which obstruct the pro-

prescribed by the section, all books, papers and writings in his custody or power relating to the execution of this act, or to give satisfaction to the said council, or to such other person as aforesaid, respecting the same, "then and in every such case, upon complaint made on behalf of the said council, by such person as they shall authorize for that purpose, of any such refusal or wilful neglect as aforesaid, to any justice of the peace," &c., "such justice is hereby authorized and required to issue a warrant under his hand and seal for bringing such officer before any two justices of the peace," &c.; "and upon the said officer appearing, or not being found, it shall be lawful for such justices to hear and determine the matter in a summary way;" moneys found due are, on non-payment, to be levied by distress and sale; "and if sufficient goods shall not be found to satisfy the said moneys and the charges of the distress, or if it shall appear to such justices that such officer has refused or wilfully neglected to deliver such account, or the vouchers relating thereto, or such list as aforesaid, or that any books, papers, or writings relating to the execution of this act remain in the hands or in the custody or power of such officer, and that he has refused or wilfully neglected to deliver the same, or to give satisfaction respecting the same as aforesaid," power is given to the justices, and they are required to commit such offender to the jail, &c., until he shall have paid, &c., or compounded with the council, and paid the composition, or until he shall have delivered a true account as aforesaid, together with such vouchers, &c., or until he shall have delivered up such books, &c., or have given satisfaction in respect thereof, to the said council, &c.; imprisonment "for want of sufficient distress only" is limited to three calendar months: Provided also, &c., ( proviso as stated above in the text.)

ceeding in the way of summary remedy, \*there is no reason for departing from the general rule, that, where a statute creates a new right or a new offence, and appoints a specific remedy, that particular remedy must be pursued, and no other; *Castle's Case*, Cro. Jac. 643; *Regina v. Wigg*, 2 Salk. 460; *Rex v. Robinson*, 2 Burr. 799, 803; other authorities in support of this proposition are collected in note (4) to *Rex v. Dickenson*, 1 Wms. Saund. 135 b, 6th ed. This count is carefully framed on the statutory duty, and not on any supposed duty at common law to do the same acts; indeed, the omitting to keep and deliver such accounts and lists is clearly not an offence at common law; and it must be in respect of matters which were offences before the statute that the statute preserves the "remedy by action against any such officer so *offending* as aforesaid." Before the statute, corporate officers were liable in trover or detinue for refusing to give up documents, the property of the corporation; in like manner, they were liable to account for the moneys of the corporation received by them; and they frequently gave bonds conditioned for the due performance of their duties, (see sect. 58,) on which they and their sureties may be sued for any omission to keep and deliver proper accounts and lists; these are the remedies by action that are not to be prevented or abridged.

The count is also bad for the reasons pointed out as grounds of special demurrer. First, the allegation that the council *duly* authorized and appointed Alfred Egginton to receive, &c. is insufficient, in not showing any directions by the council, to satisfy the words "in such manner as the said council shall direct," nor whether Egginton was appointed under the corporate seal, \*or even in writing. [COLERIDGE, J. The council are not a corporation.] They alone can use the common seal; the corporation acts only by them: it is only the notice requiring the delivery of the account, &c. that is sufficiently authenticated by the signatures of any three or more of the council. [COLERIDGE, J. That is the only proceeding on this subject which the statute requires to be in writing: it does not mention the common seal.] It cannot be sufficient to say "duly authorized." [WIGHTMAN, J. That general form of allegation is insufficient only when some particular mode of proceeding is required, which is not so here.]

The count is also defective in not showing that the matters referred to were committed to the defendant by virtue of the act, or in respect of his office as town clerk, nor, as to vouchers, that he ever had any; nor that he ever made any payments for the corporation. [COLERIDGE, J. The count follows the words of the act, alleging that the matters were committed to the defendant's charge by virtue of the act.

*Willes*, contra, was desired by the court to confine himself to the question whether the action would lie. If, in consequence of the defendant's breach of duty, the corporation were to sustain any injury, an action would lie for such breach of duty, unless the section shows that it would not lie.

Cases may be put showing that the remedy before justices is not co-extensive with the duty. Suppose a debt to be due to the corporation, and, in consequence of the officer's omission to give the list of debtors, the time of recovering it within the Statute of Limitations to expire before the corporation could sue; would not the officer be compelled in an action to \*74] pay the \*amount as damages? The proceeding before justices would be nugatory in such a case. The authorities which have been cited show only that no indictment would lie, not that an action will not lie for an injury sustained by the breach of duty. Where a statute imposes a duty on a public officer, he is responsible for neglect of that duty to any party sustaining damages by the neglect; *Barry v. Arnaud*, 10 A. & El. 646. (He was then stopped by the court.)

LORD DENMAN, C. J. It is clear that the action lies. The statute indeed provides a particular mode of obtaining the documents in respect of which the action is brought; but it does not follow that the corporation could avail themselves of this remedy before they had sustained irreparable damage from the detention. That is a sufficient foundation for an action on the case.

WILLIAMS, J. Mr. *Willes* is well founded in his distinction as to the cases that have been cited in the argument for the defendant. It may be true that the appointment of a particular proceeding by sect. 60 would exclude the remedy by indictment; but it cannot exclude an action on the case for damages.

COLERIDGE, J. I am of the same opinion. The proviso does not give the right to sue for a breach of the statutory duty, but leaves the case as it was before: then, the earlier part of sect. 60 having imposed the duty, \*75] an action clearly lies for the breach of it. The \*summary remedy is by no means co-extensive with the injury.

WIGHTMAN, J. If any effect is to be given to the proviso, it clearly shows that the remedy by action is not taken away.

Judgment for the plaintiffs. (a)

(a) Reported by R. Hall, Esq.

### The QUEEN against EDWARD COLES. *Wednesday, November 12th.*

A table of the fees and allowances to be taken by the clerk of the peace for the county of S. was, in 1826, duly settled and approved by the sessions, and confirmed by the Judges of Assize, under stat. 57 G. 3, c. 91. It authorized the taking of traverse and other fees from defendants in misdemeanor, and was acted upon till 1844, when the sessions made an order that no officer of the court should thereafter take or demand any fee or payment from any defendant in misdemeanor. Stat. 8 & 9 Vict. c. 114, was afterwards passed, which prohibits the taking of certain fees from defendants who are acquitted, or discharged by proclamation.

*Held*, on motion to quash the above orders, removed by certiorari:

That the order was a judicial proceeding, removable by certiorari.

That the order was illegal, assuming to abolish fees which had been regularly ascertained under stat. 57 G. 3, c. 91; and



That, stat. 8 & 9 Vict. c. 114, not having prohibited all such fees, this court was bound to interfere by quashing the order.

In Michaelmas term, 1844, a certiorari issued on the application of Edward Coles, clerk of the peace for the county of Somerset, to remove into this court an order made at the last preceding Quarter Sessions for Somersetshire, and which order was returned in the following form :

“Ordered that no officer of this court do hereafter take or demand any fee or payment whatsoever from any defendant in misdemeanor.”

In the same term a rule nisi was obtained for quashing the order.

The certiorari issued, and the rule was obtained, on \*the affidavit of Coles, which stated, in substance, that from the time of his appointment to the office of clerk of the peace, in 1810, to the making and confirming of the hereinafter mentioned table, he was in receipt of the fees and emoluments of his office, including certain fees taken from defendants in misdemeanor, which he verily believed were of such a description and nature as were taken by his predecessors in office: that a table of the fees and allowances to be taken by the clerk of the peace for the county of Somerset, came into force in 1826, having been ascertained, approved, and confirmed pursuant to stat. 57 G. 3, c. 91, and had thenceforth been acted upon to the time of the order in question, and still continued in force. This table, which was annexed to the affidavit, was headed “Somerset Table of fees and allowances to be taken by the clerk of the peace for the county of Somerset, ascertained, made, and settled at the General Quarter Session of the peace, held,” &c., 17th October, 1825; “approved at the next succeeding General Quarter Session of the peace held” at, &c., 9th January, 1826; “and ordered to be laid before the judges of Assize at the next assizes to be holden for the said county, pursuant to the statute of 57 G. 3, c. 91.” The ratification by the Judges of Assize was subscribed as follows: “Somerset Lent assizes, 1826. Ratified and confirmed, with the amendments to which our initials are affixed. J. Burrough. S. Gaselee.”

In the body of the table the fees were classed under various heads; of which one, that of *Articles of the Peace*, distinguished between the fees to be paid by the exhibitant and those to be paid by the defendant; but under the other heads the table did not expressly show \*the party by whom the respective fees were to be payable: e. g. under the head Indictment were fourteen subdivisions, two of which stood as follows.

#### INDICTMENT.

	£	s.	d.
1. Drawing every indictment in felony - - - - -	0	2	0
The like for assault - - - - -	0	3	6
Drawing every special indictment for an assault or misdemeanor, per folio - - - - -	0	0	8
Engrossing thereof, per folio - - - - -	0	0	4
Copy of every indictment, per folio - - - - -	0	0	8

4. *Indictment for an assault or misdemeanor discharged before traverse on agreement with the prosecutor after process issued:*

Warrant	-	-	-	-	-	-	-	-	-	0	5	0
Appearance	-	-	-	-	-	-	-	-	-	0	4	0
Copy indictment, per folio	-	-	-	-	-	-	-	-	-	0	0	8
Pleading guilty, and submission	-	-	-	-	-	-	-	-	-	0	12	6
Entering judgment	-	-	-	-	-	-	-	-	-	0	12	6
Reading and filing release	-	-	-	-	-	-	-	-	-	0	2	0

If more than one warrant has issued, add 5s. for every session after the first.

The table contained also traverse and other fees, which were in effect payable only by defendants in misdemeanor. The order was made on the motion of Mr. Escott, one of the magistrates for the county, after notice, in the terms of the order, at the last preceding Summer sessions.

The affidavits in answer stated, in substance, that no evidence existed of the clerk of the peace for Somerset having taken fees from defendants in misdemeanor before Mr. Coles was appointed to the office; \*that  
\*78] Mr. Coles had in many instances omitted to exact them when the payment was resisted; and that in thirty-two counties and seventy-two boroughs in England and Wales the clerks of the peace did not require or take any fees from defendants in misdemeanor; that the order had not been drawn up, in form as returned, by the direction of the Quarter Sessions, but that the only entry in the book wherein the proceedings of the sessions were entered was a minute that Mr. Escott's motion had been made and seconded, and carried by a majority, not specifying the terms or subject of the motion.

Sir *F. Thesiger*, Attorney-General, Sir *Fitzroy Kelly*, Solicitor-General, and *Montague Smith*, now showed cause. A certiorari lies only to remove judicial proceedings, but this is not a judicial order. [COLERIDGE, J. Are not many administrative orders of magistrates removable by certiorari?] Not unless the certiorari is given by statute, as is the case with respect to certain orders under the acts for regulating municipal corporations. In *Rex v. Lediard*, Sayer, 6, it was held that a certiorari does not lie for removing a ministerial warrant of a justice of the peace. In *Rex v. Lloyd*, Cald. 309, where a certiorari had issued to remove an order of sessions for the employment of an attorney to conduct a certain prosecution at the county expense, the court, though they admitted that the order was illegal, quashed the certiorari; and BULLER, J., said: "The certiorari ought not to have issued. It is settled in the case of *Rex v. Lediard*, that a certiorari does not lie to remove any other than judicial acts." [WIGHTMAN, J.

\*79] Why is it \*assumed that this is not a judicial order? Is it administrative? Lord DENMAN, C. J. A judicial body makes an order on its officer as to all misdemeanors. Is it to be contended that this is not a judicial proceeding?] It is a mere general order, touching no



particular cause. On reference to the authorities which are collected in Tomlin's Law Dictionary, tit. *Certiorari*, it will be found that the control over inferior courts by means of this writ is exercised only as to judicial proceedings between parties. If it be objected that the orders of the Poor Law Commissioners are removed in this manner, it may be observed that they are, in substance, judicial proceedings between party and party. A certiorari lies in all judicial proceedings in which a writ of error does not lie, to enable this court to do the justice which has not been done in the inferior court; but what can the court do in this case further than expressing an opinion on the legality of the order? [COLERIDGE, J. In *Williams v. Lord Bagot*, 4 Dowl. & R. 315, this court ordered the practice of the inferior court to be returned.] The court may always, by certiorari, learn any thing which the inferior court can inform it of in aid of the administration of justice: but here there is no cause in which the court can give judgment. This is not only no judicial order, but a nullity: it is a mere minute of a resolution of justices never drawn up as an order. [COLERIDGE, J. What is a minute but instructions for an order? If no order has been drawn up, the sessions must make their officer draw one up.] If the fees are legal, Coles may take them notwithstanding the order, which would be no evidence against him on an indictment for extortion.

\*But, assuming that the order can be brought up, the fees which it abrogates are illegal. They cannot be claimed by prescription; [•80 for the office of clerk of the peace has been created within the time of legal memory; *Harding v. Pollock*, 6 Bing. 25, 44. Neither could the crown grant such fees. In 2 Inst. 209, 210, Lord Coke, in commenting on stat. Westminster, (3 Ed. 1, c. 26,) points out that the words "nor other the king's officer" must be understood to mean all "inferior ministers and officers of the king, whose offices do any way concern the administration or execution of justice, or the common good of the subject, or for the king's service; that none of the king's officers or ministers do take any reward for any matter touching their offices, but of the king." He observes, that the statute is made in affirmance of a fundamental maxim of the common law, and, remarking that some acts of parliament changing the rule of the common law have given to the ministers fees in some particular cases to be taken of the subject, adds: "but at this day they can take no more for doing their office, than have been since this act allowed to them by authority of parliament." To the like effect are 2 Inst. 176, 4 Inst. 271, 274, 3 Bac. Abr. 563, (ed. 7,) tit. *Fees* (A.) The principle that no officer can claim a fee except by ancient usage or act of parliament, was admitted by the court in *Fleetwood v. Finch*, 2 H. Bl. 220. It will not be contended that the clerk of the peace has a prescriptive right to any of these fees; even if they could be taken by custom, it must be by uniform invariable custom, the existence of which is negatived here by the usage of thirty-two \*counties and seventy-four boroughs. Lord DENMAN, C. J. The circumstances under [•81

which these fees are not taken in those places do not appear. Different judges may have formed different opinions as to particular fees ; or certain clerks of the peace may have thought proper not to enforce them. The parties who support this order must be prepared to contend that no one fee in the list of fees abolished by it can be legally taken from defendants in misdemeanor.]

The only remaining question is, whether there is any statute by which these fees, or any of them, are authorized. The only statute which can have that effect is stat. 57 G. 3, c. 91, which, after reciting that “doubts have arisen touching the fees and allowances due and to be made to the clerks of the peace of the several counties and other divisions in England and Wales,” authorizes the justices, in general, annual, or quarter sessions, (as the case may be,) to ascertain, make and settle a table of fees and allowances to be taken by the clerk of the peace, subject to the approbation of the justices at the then next sessions: the table so approved is to be laid before the Judge of Assize, or, in certain cases, the Justices at the next assizes for the adjoining county, who “are hereby authorized to ratify and confirm such tables respectively, either as settled and approved as aforesaid, or with such alterations, additions and improvements as to such judges and justices last mentioned shall appear to be just and reasonable.” The statute then authorizes the justices in sessions from time to time in like manner to make other tables of fees, to be approved of, ratified, and confirmed in like manner, “which fees and allowances contained in such tables respectively, when so made and approved, and

\*82] afterwards ratified and confirmed as aforesaid, shall be the only fees and allowances which shall be taken by the clerks of the peace of the several counties and places for which such tables respectively shall be so made, approved, ratified and confirmed, from and after such ratification and confirmation thereof respectively ; any thing in any act or acts of parliament, or any law, usage, or custom to the contrary in any wise notwithstanding.” This statute does not authorize the creation of new fees ; it only provides a mode of ascertaining and limiting the amount of such lawful fees as were already taken. It certainly does not authorize the imposition of fees to be paid by defendants, which would be contrary to the common law, and, where made a condition precedent to the trial of an offender, would impede the course of justice. So far as the table authorizes any such fees it is illegal. So far as any of these fees may be lawfully taken from any other quarter they are not disturbed by this order, which merely says that the fees shall not be taken from defendants. In most of the instances the table itself does not point out by whom the fee is to be paid : it is left uncertain whether a defendant is not to pay for the warrant for his own apprehension. [COLERIDGE, J. Whoever wants the thing in respect of which the fee is made payable must pay the fee ; the prosecutor if he takes out a warrant ; the defendant if he enters an appearance.] If there be any doubt as to the right, the justices have

exercised a reasonable discretion in directing their officer not to take the fees until the right is settled. This case is one of those in which the court, in the exercise of its discretion, will refuse to interfere; for, since the making of this order, stat. 8 & 9 Vict. c. 114, has passed, prohibiting the fees which it was the object of the order to abolish.

[\*83]

\**Crowder, Kinglake, Serjt., and Moody, contra.* It is too late to object to the issuing of this certiorari after the rule for quashing the order has been enlarged by consent; *Rex v. Hartshorn*, 2 Burr. 745;(a) and, though the order is a nullity in fact, it is not a nullity on the face of it; and it is a judicial order. [Lord DENMAN, C. J. The court entertain no doubt as to its being a judicial order.]

If any one fee in the table is proper to be paid by a defendant, the order is wrong in substance. As to many of them, such as the fees on traverses, on agreements with the prosecutor, and on recognisances, it is reasonable that the defendant should pay them, for in each of these cases the proceeding is taken at his instance and for his benefit. But it is said that none of these fees are sanctioned by usage or by statute. It is settled that officers of courts of justice are entitled to some fees for their trouble; *Regina v. Baker*, 7 Ad. & El. 502: and stat. 57 G. 3, c. 91, recognised the existence of some fees to be lawfully taken by the clerk of the peace: therefore the objection that the office was created within the time of legal memory cannot prevail. But stat. 55 G. 3, c. 50, ss. 4, 5, distinctly recognises the practice of charging fees on defendants. After reciting (sect. 4) that "it is customary for clerks of the assize, clerks of the peace," and other officers, "to demand and take from persons indicted, divers sums in the way of fees," it is enacted that every prisoner charged with or indicted for felony or misdemeanor, against whom no bill shall be found, or who shall be acquitted, or who shall be discharged by proclamation for want of prosecution, "shall be immediately set at large, without payment of any fee or sum of money, for or in respect of his, her or their discharge, to any person or persons whomsoever;" and (by sect. 5) "all such fees as have been usually paid or payable to the several clerks of assize and clerks of the peace," &c., "in any of the cases aforesaid, shall absolutely cease, and the same are hereby abolished and determined; and, from and after the passing of this act, no clerk of assize, clerk of the peace," &c., "shall ask, demand, take or receive any sum or sums of money, from any of the said prisoners as fees, for or in respect of his, her or their discharge:" and sect. 7 provides for an indemnification to the clerk of the peace for these fees; which would hardly have been done had all fees from defendants for misdemeanor been necessarily illegal. Stat. 8 & 9 Vict. c. 114, extends the provisions of stat. 55 G. 3, c. 50, to all persons charged with felony or misdemeanor, whether prisoners or not, and adds "that it is not and shall not be lawful to demand

[\*84]

(a) The present case stood in the crown paper; and the rule was enlarged from term to term as of course, till its turn for hearing came on.

or take from any such persons any fee for their appearance to the indictment or information, or for allowing them to plead thereto, or for recording their appearance or plea, or for discharging any recognisance taken from any such persons, or any surety or sureties for them." This statute is subsequent to the order now under consideration, and may make it necessary to amend the table in the manner provided in that behalf by stat. 57 G. 3, c. 91, but it inferentially recognises the legality of fees charged upon defendants, and does not abolish fees on traverses, or other proceedings between the recording of the plea and the trial. In order to

\*85] support any particular fee as the customary \*fee, the usage need not be either uniform throughout England, or immemorial in point of time; the fees to be ascertained under the statute are those which at the time of settlement are usually paid in the particular court. "The fees in sessions, for traversing, trying, or discharging indictments, discharging recognisances and the like, do vary according to the different customs in different places;" 3 Burn's Just. 213.(a) COLERIDGE, J. also, in *Regina v. Baker*, 7 A. & E. 18, recognises the different practice of different courts in this respect. In *Regina v. Bishop*, Car. & Marsh. 302, a defendant, under indictment for perjury, had traversed, and entered into recognisance to appear and try his traverse at the next assizes, at which, in order to avoid the payment of his traverse fees, he offered to surrender himself and take his trial: this being refused, his counsel brought the matter before the court there; and COLERIDGE, J., said: "I can only take the words of his recognisance as I find them; and I understand the practice is to require payment of the fees before the traverse can be entered. On the Oxford circuit, the clerk of the crown receives a salary, and is accountable for all the fees, so that it is impossible for him to remit any of them: and I think it far better that their payment should be insisted upon in all cases, and that the legislature should interfere to direct a compensation to the officers, if that be thought advisable."

This order is also bad, as being an attempt by a simple order of sessions to repeal a table regularly settled and ratified under stat. 57 G. 3, c. 91, which cannot \*legally be altered except by a similar proceeding

\*86] under that statute.

LORD DENMAN, C. J. It appears to me that the order cannot be sustained. The first document to which we are referred is a table of fees which was settled in the year 1826, under the authority of stat. 57 G. 3, c. 91, and with the sanction of two judges of assize then going the circuit. That table is *primâ facie* a statement of fees that ought to be paid, and imports that they had been ascertained to be legally due. The justices in sessions and judges had no power under the statute to create fees: they had power to ascertain those which legally had been paid, and to prescribe those which for the future should be paid. But those which were to be

(a) Dooley and Williams's edition, Criminal Law, tit. *Extortion*; 2 Burn's Just. 1037, tit. *Extortion*; 29th (Chitty & Bere's) edition.

paid for the future were required to be fees to which the party had been liable before the making of the table. I am not sure that my brother Kinglake is not well founded in his argument that this table alone is sufficient to show the authority of the clerk of the peace to take the fees which are now complained of; but, in addition to this, it is perfectly clear, from stat. 55 G. 3, c. 50, that fees of this description were formerly payable by defendants; and, if so, it is quite clear that the sessions have assumed to do more than they had any right to do when they say, as they do in this order, that none of these fees shall be payable in future by any defendant in misdemeanor. Then, having these matters brought before us in this manner, we are bound to say that, the rights of the officer of the court having been thus judicially ascertained, the sessions have, in making this order, assumed a power which does not properly belong to them. This is a judicial \*order on a matter of great importance, and I think we are not at liberty to decline the exercise of our jurisdiction, though it is not imperative on us to interfere in every case where right has not been done. [\*87

WILLIAMS, J. It has been properly conceded that, if in any single instance any fees were legally payable by defendants in misdemeanor, this order, which suppressed all such fees without exception, cannot be supported. For the reason already stated by my lord, I think that a presumption in favour of some such fees arises from stat. 57 G. 3, c. 91; for, as that did not give the power of making new fees, but provided the means for settling existing fees, it seems to follow that some such fees must have been payable before. Then stat. 55 G. 3, c. 50, distinctly recognises fees of this description as being at that time due and payable. The statute 8 & 9 Vict. c. 114, might have caused some hesitation in the court as to the propriety of interfering in the matter, if it could be seen that this order only did what that act, passed since the date of the order, has now done: but, on referring to that statute, it is quite clear that the order was not in substance a mere anticipation of its provisions. There are certain stages of proceedings, and certain fees, to which that act does not apply, for instance, the fees payable upon traverses; but this order abolishes all such fees without any exception.

COLERIDGE, J. I am entirely of the same opinion. All that I would say is that this order is inconsistent with the table of fees ascertained and settled under the authority of stat. 57 G. 3, c. 91. The argument in \*support of the order put the matter too high when it supposed that no fees whatever could be taken by the clerk of the peace because he was not an officer immemorially entitled at the common law to take fees. It is certainly well known that the office of clerk of the peace was created within the time of legal memory; but on its being created it became analogous to that of the clerk of assize, which is an immemorial and prescriptive office; and we may easily conceive that the officer of the newly created court would from the earliest period be deemed to be [\*88

entitled to fees of the same sort as had been paid to the analogous officer of the old and immemorial court. But this is going too widely into the matter which, after all, must be decided on the modern statutes. The question is whether this table of fees was warranted in point of law. The statute 57 G. 3, c. 91, contains provisions for ascertaining and settling the fees and allowances in the most deliberate manner; for the table, after being settled at one sessions, is to be again considered at another, and, if then approved of, is to be submitted to the Judges of Assize, who are to ratify and confirm, or alter, the same, as to them may seem fit. When the final allowance has been made by the judges, the clerk of the peace has no right to take any other fees but what are set forth in the table, until the same process shall have been gone over again, and a new table established. His being restricted from taking any other fees than those which are put down in the table raises a strong inference in favour of his right to take the fees there set forth, so strong as to throw on the other side the onus of showing that those fees were illegal. But, even if \*89] it were necessary for the clerk of the peace to show \*the legality of fees authorized by the table, I think that is sufficiently done by referring to stat. 55 G. 3, c. 50.

WIGHTMAN, J. I entertain no doubt whatever that this order is a judicial order, and has therefore properly been brought before this Court by certiorari; and that it is no answer to the application, to say that the order was a nullity, and therefore cannot affect the applicant. The effect of the order is, that the clerk of the peace is not to take any fees whatever from any defendant in misdemeanor. It was argued that this order did not do more than restore things to the state in which they were before its existence, for that the right to take these fees had never been a legal right. But the statutes 55 G. 3, c. 50, and 57 G. 3, c. 91, both recognised the legality of taking such fees; and the latter statute provides means for settling their amount: and in 1826 the general table of fees, which this order partially abrogates, was duly prepared and settled. It would be a short and easy mode of getting rid of the table of fees duly allowed by judges under the authority of an act of parliament, if a subsequent court of Quarter Sessions could make such an order as this. If this order could be supported, the sessions might by a mere resolution disallow any particular fee, or number of fees, though allowed by the judges; which would lead to this anomaly, that there might be a table of fees unreversed by any legal authority, and at the same time an order of sessions forbidding their officer to take any particular fees, or perhaps any fees at all.

Rule absolute.(a)

(a) Reported by R. Hall, Esq.



**\*RICHARDS against SYMONS.** *Thursday, November 13th.* [\*90

Plaintiff having a cow at grass in defendant's field, and being indebted for the agistment, agreed with him that the cow should be a security, that he would not remove her till defendant was paid, and that, if he did, defendant might take her wherever she might be, and keep her till he was paid. Plaintiff removed the cow, not having paid the debt; and defendant seized her in the high road. In an action of trespass for the taking, *Held*, that the agreement might be set up as a defence under a plea that the cow was not the plaintiff's.

**TRESPASS** for seizing and taking plaintiff's cow, and converting and disposing, &c.

Pleas. 1. Not guilty. 2. That the said cow was not at the said time when, &c., nor is, the cow of the said plaintiff, in manner, &c.: conclusion to the country. Issue thereon.

On the trial, before WIGHTMAN, J., at the Cornwall summer assizes, 1844, it appeared that the plaintiff had grazed his cow in the defendant's field at a weekly sum for the agistment, but had afterwards removed her, and defendant had then seized her in the high road and taken her into his possession. The defendant proved that, before the alleged trespass, plaintiff owed defendant 7*l.*, for the agistment, and on another account, and wished to buy some straw of him; defendant then asked how he was to be paid the money already due for the cow: and plaintiff answered that the cow was a security, that he would not remove her before defendant was paid, and that, if he did, defendant might take the cow wherever he could find her, and keep her till he was paid. The sum due for agistment was unpaid at the time of the seizure. It was objected, for the plaintiff, that this defence was not admissible under a plea merely denying property, but that the defendant should have pleaded the agreement specially, or at least leave and license. The learned Judge reserved the point. Verdict for plaintiff on the first issue, for defendant on the second. *Butt*, in Michaelmas term, 1844, obtained a rule to show \*cause why a [\*91 verdict should not be entered for the plaintiff on the second issue.

*M. Smith* now showed cause. There is, at common law, no lien upon cattle for agistment: but there may be such a lien by agreement; *Jackson v. Cummins*, 5 M. & W. 342, where it is clear that the lien would have been recognised if the agreement had been proved. Here, the defendant had a lien by contract; that gave him a special property as against the plaintiff, and entitled him to plead that the cow was not the plaintiff's. *PARKE*, B., in *Jackson v. Cummins*, thought that, if the lien had existed, the proper plea would have been Not possessed. *Reeves v. Capper*, 5 New Ca. 136, is not distinguishable in principle from this case. There, Wilson, the owner of a chronometer, in consideration of a loan, agreed to make over the chronometer to the defendants until their advance should be repaid, they allowing him the use of the chronometer during the voyage on which he was then departing. Wilson accordingly placed it in the defendants' hands: they returned it to him; and he took it on the voyage. The court



of Common Pleas held that the defendants had a right in the chronometer as a pledge, and that such right had not been divested; for that the delivery to Wilson under the terms of agreement itself was not a parting with the possession, but the possession of Wilson was theirs, the agreement giving him no interest, but only a license to use the chronometer for a limited time. *Franklin v. Neate*, 13 M. & W. 481, shows that a special  
 \*92] property may exist in the person to whom a chattel is \*pawnd, though the pawnor may retain such a property in it as entitles him to sell.

*Butt*, contra. Where a defendant, as here, acquires merely a right to take the property of another, that should be pleaded as a license. [WIGHTMAN, J. Is not the case rather this, that the agreement gives the defendant a special property, with a license to the plaintiff to take the cow for occasional use?] No right of disposing was given to the defendant, but only a right to acquire a lien. That ought to have been pleaded specially. Under common circumstances, where there was no possession there could be no lien. In *Owen v. Knight*, 4 New Ca. 54, (cited in *Jackson v. Cummins*, 5 M. & W. 349,) the defendant had actual possession. If the defendant here had by agreement a right making continued possession unnecessary, he should have pleaded it according to the fact. [WIGHTMAN, J. The effect of the agreement, according to the defence, was that, when actual possession was gone, the property should not be divested. If that had been stated in terms, would it have amounted to more than Not possessed?] An agreement to give a lien does not constitute a lien. The taking possession in consequence gives it. [WIGHTMAN, J. Do not you introduce a fallacy by using the word lien? They speak of a special property.] A lien is nothing else. And it is the same thing whether created by common law or by special agreement. *Whittington v. Boxall*, 5 Q. B. 139, shows that title in the defendant, as distinguished from actual possession, will not support the plea of Not possessed: and this agrees with the doctrine laid down in *Stukeley v. Butler*, Hob. 168,  
 \*93] 174, 175, (5th ed.,) that a party \*alleging right to property which is not his in actual possession, but will become his on the fulfilment of some requisite, must plead specially. It is a principle, recognised in *Ashmore v. Hardy*, 7 Car. & P. 501, 505, as well as in *Whittington v. Boxall*, that a defendant pleading only that the property in question was not the plaintiff's, cannot put him to proof of his title, but is liable if the plaintiff show possession in fact. In the latter case all the principal authorities are cited. *Jackson v. Cummins* is in the defendant's favour; the claim of a lien there was rested on an agreement; the agreement was specially pleaded, and, if proved, would have been admissible as a defence under that plea and not otherwise. *Reeves v. Capper*, 5 New Ca. 136, did not turn upon a question of pleading; nor does it lay down any proposition adverse to the defendant's case.

Lord DENMAN, C. J. It is well established that a lien is admissible as

a defence under a plea denying property in the plaintiff. The question here is, whether the defendant, at the time in question, held the property under a lien; and, upon the construction of the agreement, I think he did. The liberty of milking made no difference. The plaintiff is indebted to the defendant: he makes an agreement, giving the defendant a lien, and engaging that he may retake the cow if ever the plaintiff removes it out of his possession. It is a fallacy to say that, when the cow was so taken, the lien was lost. It never was put an end to. There was no voluntary parting with the possession: and a wrongful act of removal \*could not determine the defendant's right to have the cow till his debt [\*94 was paid.

WILLIAMS, J. The terms of the agreement decide this case. When it is said that the lien is lost if the possession is gone, the very case is mentioned which the parties here provided against by their agreement. It was their express bargain that the defendant might come and take the cow wherever he might find her. The property then continued in him at all times; and the lien was never lost.

WIGHTMAN, J.(a) In an action for personal chattels, the plea denying property in the plaintiff means that he has no property as against the defendant. Here, it is contended that the property vested in the defendant was divested when the cow was removed out of his possession. But the effect of the agreement was that, if the cow was removed, the right was replaced upon the defendant's getting possession again; that was the state of things, however anomalous, which the parties meant to provide for by their contract. I think, therefore, that the special property, whether called lien or by any other name, was never gone from the defendant.

Rule discharged.

(a) Coleridge, J., was absent on account of indisposition.

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\*The Mayor, Aldermen and Burgesses of THETFORD against CHARLES DEWING TYLER. Thursday, Nov. 13th. [\*95

Tenant of premises at 47*l.* a year received notice to quit; and the landlord agreed with another party for a holding to commence on the expiration of the current term, at 80*l.* a year. Before the term expired, the new tenant, by consent of all parties, was admitted in place of the outgoing tenant; and the rent was paid at the rate of 47*l.* to the end of the original term. Disputes arising on the new agreement, it was abandoned; but the new tenant continued to occupy.

*Held*, that it was a question for the jury, in an action for use and occupation, what rent was fairly payable for the continued holding; no necessary inference arising, under the circumstances, from the former holding at 47*l.*

DEBT; laid at 40*l.* for use and occupation of an inn, messuage, &c., and 40*l.* on an account stated.

Pleas. 1. Except as to 23*l.* 10*s.*, parcel, &c., Never indebted. Issue thereon. 2. As to 11*l.* 15*s.*, parcel of the said 23*l.* 10*s.* and the damages

by detention thereof, payment of 11*l.* 15*s.*, and acceptance in satisfaction by plaintiffs. Verification. The plaintiffs, by their replication, denied the payment and acceptance; and issue was joined thereon. 3. As to 11*l.* 15*s.*, residue of the said 23*l.* 10*s.*, and the damages, &c., payment into court; which the defendants accepted.

On the trial before ALDERSON, B., at the Norwich summer assizes, 1844, it appeared by the particulars of demand that the action was brought to recover half a year's rent of the Red Lion inn at Thetford, (the property of the corporation,) from 11th October, 1843, to 6th April, 1844, at the rate of 80*l.* a year. The defendant's mother had held the premises seven years, ending October 11th, 1843, by demise from the corporation, at the yearly rent of 47*l.* In February, 1843, the corporation (having given Mrs. Tyler notice to quit) advertised the premises to be let by tender, upon lease for ten years from the ensuing 11th October. The defendant made a tender, proposing to rent the premises at 80*l.* a year for the term proposed, a lease being drawn with certain specified covenants, and the corporation putting the \*premises into repair before the commencement  
 \*96] of the term. The acceptance of this offer was proved by the corporation minutes, which stated that, on the meeting of the town council, March 31st, 1843, there were three tenders, (naming the parties and amounts;) that the votes for the tenders respectively were, &c., (stating the numbers:) "and the tender of C. D. Tyler was accepted at 80*l.*; and the town clerk was directed to prepare the lease." At a meeting of the council on 6th April, 1843, the defendant and his mother requested that the corporation would accept him as tenant for the remainder of her term.<sup>(a)</sup> This was assented to; and the defendant in the same month took possession. In May, 1843, the defendant requested the corporation to paint (which, as he alleged, the terms of the tender obliged them to do,) and to repair. The demands were not complied with. In November, 1843, the town clerk sent the defendant a draft of lease for perusal; but he  
 \*97] \*declined executing such lease, because the premises had not been repaired before the 11th October, 1843, and because the draft did not mention certain privileges which, according to the advertisement, were

(a) It appeared by the minutes that, at the meeting of the council on April 6th, 1843, the following letters from the defendant and his mother were read:

"Sir,—I should feel obliged if you would call a special meeting of the council on Thursday next, to accept me as tenant for the remainder of my mother's term, as it is her wish, and the transfer day for alehouse licenses, is on the 10th instant. I am," &c., "C. D. TYLER."

"The Mayor.

"1st April, 1843.

"Gentlemen,—It is my wish that my son, Charles D. Tyler, should become the tenant of the Red Lion and premises for the remainder of my term. Yours respectfully, F. TYLER."

"The Council.

"Thetford."

The minutes then continued: "At this meeting Mr. C. D. Tyler attended; and it was unanimously agreed that he be accepted as tenant of the Red Lion and premises for the remainder of his mother's term at her rent.

"L. S. BIDWELL."

"Mayor."

to be included. The parties finally disagreed on these points; and no lease was executed. The corporation repaired the premises; but the repairs were not finished till April, 1844. The rent, to October 11th, 1843, was paid up; and the defendant, in February, 1844, paid the treasurer of the corporation 11*l.* 15*s.* as the quarter's rent from October 11th, 1843, to January 6th, 1844, at the former rate.<sup>(a)</sup> The corporation insisted upon rent at the rate of 80*l.* specified in the tender, and declared in the present action in June, 1844.

It was contended for the plaintiffs on the trial, that, in default of express agreement, the defendant was liable to pay so much for rent as a jury should think the occupation worth; and that this, by the evidence on the point, appeared to be 80*l.* a year. For the defendant it was urged that the case was one of those in which a party holding over is considered to hold on the terms of the original tenancy. ALDERSON, B., thought that the latter principle did not apply, for that, in this case, the defendant must be considered a stranger to the original tenancy: but he reserved leave to move on this point; and he directed the jury to consider what was a fair rent for the defendant to be charged with, making him an allowance for the neglect of the corporation to repair. Verdict for plaintiffs on the first issue, for 11*l.* 10*s.*: on the second issue for defendant.

\**Hugh Hill*, in Michaelmas term, 1844, obtained a rule to show cause why a verdict should not be entered for the defendant on the first issue. He cited *Phipps v. Sculthorpe*, 1 B. & Ald. 50, as showing that, when the defendant was admitted to the premises in place of his mother, he became tenant from that time till October, as if he had been party to the original taking. [\*98]

*Byles*, Serjt., and *Worlledge*, now showed cause. The original tenancy was clearly put an end to on the 11th of October, 1843, and not renewed. The plaintiffs, after that time, could not have distrained for any arrears of rent at 47*l.* as accruing under the old tenancy; *Alford v. Vickery*, Car. & Marsh. 280; *Jenner v. Clegg*, 1 M. & Rob. 213. The first rent, therefore, can be no criterion in the present case; and the new agreement has never been ratified. Then what prevents ascertaining, through a jury, the rent which ought to be paid for the occupation? And, in this inquiry, the rent actually named in the new agreement might be a proper guide. It is not a fixed rule of law that, where premises are held, after the expiration of a tenancy, without an express new contract, the original terms continue. Whether they do so or not, in such a case, is a question always dependent on circumstances; *Elgar v. Watson*, Car. & Marsh. 494. The language of ABBOTT, C. J., and HOLROYD, J., in *Hamerton v. Stead*, 3 B. & C. 478, agrees with the view taken here by the plaintiffs. It was not the intention of the parties that the defendant should have any right after

(a) It was agreed on the trial that the receipt of this sum was not to be taken as an admission on the part of the plaintiffs, but that it entitled the defendant to a verdict on the second issue.

the expiration of the original term, otherwise than under his agreement  
 \*99] with the corporation: \*that agreement, at 80*l.* a year, was made  
 before the defendant was admitted in place of his mother: it cannot  
 then be inferred, from his holding as substitute for her during the residue  
 of her term, that he was intended to hold afterwards at the rent which  
 she paid. [Lord DENMAN, C. J. I think the fact of his being admitted  
 after the agreement for his own tenancy is very material.]

*H. Hill*, contra, was then called upon by the court. The defendant  
 having become assignee of his mother's term for the last half year, the  
 question is on what terms he held afterwards; that is, what implied con-  
 tract for a subsequent holding may be gathered from the facts. It is true  
 that there was an agreement for a new tenancy; but the plaintiffs refused  
 to carry it into execution. Then what implication can arise from it? The  
 case is the same as if the mother herself had held till the expiration of her  
 term, and then made a new agreement, which the plaintiffs had declined  
 to execute. It would then have been a proper assumption that the par-  
 ties contemplated going on upon the old stipulation. If the plaintiffs  
 here meant the new agreement to take effect, they should have done the  
 repairs and amended the draft of the lease. The action for use and  
 occupation is founded on contract; *Birch v. Wright*, 1 T. R. 378, 387, (a)  
 which contract must, in each case, be gathered from the nature of the  
 transaction and conduct of the parties. *Digby v. Atkinson*, 4 Camp. 275;  
 and *Torriano v. Young*, 7 Car. & P. 8, exemplify this. Here the trans-  
 \*100] action affords no evidence of a contract \*to continue the tenancy  
 on the principle of quantum valebat. *Hamerton v. Stead*, 3 B. &  
 C. 478, turned on very different circumstances: there was no renewed  
 holding by the same party, and no inference to be drawn from the amount  
 of a former rent.

Lord DENMAN, C. J. The fallacy in Mr. *Hill's* argument lies in making  
 the plaintiff's case depend upon a contract to pay the higher amount of  
 rent. But the case rests upon a principle resulting from the nature of an  
 action for use and occupation, namely, that he who holds my premises  
 without an express bargain agrees to pay what a jury may find the occu-  
 pation to be worth. Where a party, having held for a term at a certain  
 rent, continues to occupy after the expiration of his term, it is presumed,  
 if there be no evidence to the contrary, that he holds at the former rent.  
 But in the present case there is so clear an indication of an intent to alter  
 the terms that that principle cannot apply. If the premises, for want of  
 repair, had fallen in value below the old rent, the plaintiffs could not have  
 insisted that the defendant should hold on at 47*l.* a year: neither are they  
 bound, as the case stands, to go on receiving 47*l.* only. Whose fault it  
 was that the new tenancy did not come into operation, is left uncertain;

(a) See *Beverley v. The Lincoln Gas Light and Coke Company*, 6 A. & E. 829, 839; *Gibson v. Kirk*, 1 Q. B. 850, 855.

but that makes no difference in the decision. The rule must be discharged.

WILLIAMS, J. I am of the same opinion. Under the peculiar circumstances, the ordinary inference of law does not arise.

\*WIGHTMAN, J.(a) When a party is allowed to hold after the expiration of a tenancy by agreement, the terms on which he continues to occupy are matter of evidence rather than of law. If there is nothing to show a different understanding, he will be considered to hold on the former terms; but here we have evidence to the contrary. The terms of the future holding were stated by an agreement anterior to the defendant's possession: he was to come in on those terms at the expiration of the tenancy then subsisting: and then, for reasons of convenience, he was let in before that tenancy expired. Under such circumstances it was properly a question for the jury what amount of rent was to be paid when the new holding began, the agreement not taking effect. The usual inference from the original terms of holding did not arise, and the question was left open. Rule discharged.(b).

(a) Coleridge, J., was absent on account of indisposition.

(b) See *Johnson v. The Churchwardens of St. Peter, Hereford*, 4 A. & E. 520; *Jones v. Shears*, 4 A. & E. 832.

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\*The QUEEN against RICHARD JOHNSON. *Wednesday*, [ \*102  
*November 19th.*

Stat. 2 & 3 Vict. c. 12, s. 4, which forbids the instituting any prosecution for offences under that act except in the name of the Attorney or Solicitor-General, applies only to offences created by the act itself, though, by sect. 6, it is to be construed as one act with stat. 39 G. 3, c. 79, which creates other offences.

Where a statute gives a form of conviction, not fully describing the offence, the conviction, nevertheless, must fully describe it; but in the part which awards the penalty it is sufficient to follow the statute form: although the enacting part of the statute gives part of the penalty to the informer, and the form is not so drawn as to show who he is.

THE following conviction was returned into this court on certiorari.

“Borough of  
Kingston upon  
Hull, to wit.” Be it remembered that, on,” &c. (8th October, 1844,) “Richard Johnson, of,” &c., “is duly convicted before us,” &c., (names of justices,) “three of her majesty’s justices of the peace for the said borough of K. upon H., in pursuance of an act,” &c. (39 G. 3, c. 79,) intituled “An act for the more effectual suppression of societies established for seditious and treasonable purposes; and for better preventing treasonable and seditious practices.” “For that, on the 20th day of September, A. D. 1844, at the parish of Holy Trinity, in the Borough of K. upon H. aforesaid, a certain person, to wit, one Mrs. Martin, did publicly deliver a certain lecture on the subject of The follies and crimes of Christian Missions, in a certain room in the house of one James Preston Watson, situate,” &c., “the said house being an inn called



or known by the name or sign of the White Horse Inn, to which room aforesaid divers persons were admitted by and upon payment of money for the purpose of hearing the said lecture so delivered as aforesaid; the said house called," &c., "not being a house licensed in pursuance of the statute in such case," &c.; "for the purpose of delivering for money lectures or discourses therein, and the said room in the said house not being so licensed as aforesaid: and that the said R. Johnson, on the said 20th day,"  
 \*103] &c., "at the parish," &c., "aforesaid, in the borough aforesaid, did unlawfully and contrary to the said act receive of and from one George Freeman the sum of 2d. for the admission of him, the said G. Freeman, into the said room to hear the said lecture during the time of the delivery of the lecture aforesaid, the said house then and there not being licensed in pursuance of the statute in such case," &c. "for the purpose," &c. (as before,) "and the said room in the said house not being then and there so licensed as aforesaid, and the said R. Johnson knowing the said room to be open for the purpose aforesaid at the time he so received the said money from the said G. Freeman for his admission into the said room to hear the said lecture, and also knowing that neither the said house nor the said room was so licensed as aforesaid: whereby, and by force of the statute in such case made and provided, the said R. Johnson hath forfeited for his said offence the sum of 20l., to be distributed as the act directs. Wherefore we the said," &c. (names of the justices) "adjudge that he the said R. Johnson do pay the sum of 20l. as a penalty for this said offence, in pursuance of the said act. Given," &c. (Date, and signatures and seals of the justices.)

It appeared by the affidavit on which the writ was obtained, that the information, (a copy of which was annexed,) purported to be laid by Andrew McManus, who was superintendent of police for the borough of Kingston upon Hull; that it was in fact laid by him; and that the case in support of it was conducted before the magistrates by the town clerk. The case being set down in the Crown paper,

*J. H. Parry* now moved that the conviction might be quashed. First:  
 \*104] This information is laid under \*stat. 39 G. 3, c. 79, s. 15. But stat. 2 & 3 Vict. c. 12, s. 1, after reciting the provisions of that act against printing books or papers without the printer's name, and stating that those provisions "have given occasion to many vexatious proceedings at the instance of common informers," repeals the act as to the punishment of that offence, and sect. 2 substitutes a new clause for the same purpose. Sect. 4 enacts that it shall not be lawful for any person to prosecute any information before justices for recovery of any penalty "incurred, or which may hereafter be incurred under the provisions of this act, unless the same be commenced, prosecuted," &c. "in the name of her majesty's Attorney-General or Solicitor-General." And then sect. 6 enacts "That the said act," (39 G. 3, c. 79,) "and all acts made for the amendment thereof except so far as herein repealed or altered, shall be construed as one act



together with this act." Therefore the present information is not laid by proper authority. *Ex parte Higginbotham*, 9 Dowl. P. C. 200, is a decision to the contrary; but the judgment there was given without full discussion. It is true that the preamble of stat. 2 & 3 Vict. c. 12, recites only a particular provision: but that recital cannot limit an enacting clause; the object of the statute, as shown by the title, is two-fold; to amend the former act, and "to put an end to certain proceedings now pending under the said act:" and there is a clause (sect. 5) for the latter purpose, which relates to all proceedings "for the recovery of any pecuniary penalty or penalties incurred under the said recited act." The effect of an enactment incorporating an earlier with a later statute is shown by *The Guardians of the Banbury Union v. Robinson*, 4 Q. B. 919. Secondly, the conviction does not distribute the penalty.<sup>(a)</sup> [\*105] [WILLIAMS, J. Stat. 39 G. 3, c. 79, by sect. 38, (b) and the schedule, gives general forms in which the adjudication is framed as in this conviction.] Still the conviction is bad, if it leaves out any material statement; Paley on Convictions, p. 71, 3d ed., by Deacon, (Part II. chapter 1, sect. 1.) The informer is not named in the conviction: therefore the magistrate would not know to whom one moiety of the penalty was to be paid. *Rex v. Seale*, 8 East, 568, shows the materiality of this objection. [Lord DENMAN, C. J. You would say that the schedule, when giving a general form, takes it for granted that the informer's name will somewhere appear.] That must be supposed. In *Rex v. Helps*, 3 M. & S. 331, where the question arose on a commitment, it was assumed by the court, and scarcely disputed in argument, that the court ought to see, by some part of the proceedings returned, who the informer was. But it should appear distinctly on the conviction itself, who is to receive the sum awarded; *Rex v. Priest*, 6 T. R. 538. Were this not so, a party might remain in prison though able and ready to pay the penalty.

*Martin*, contra, was stopped by the court.

\*Lord DENMAN, C. J. I do not well know what was intended by the enactment that stat. 39 G. 3, c. 79, should be construed [\*106] as one act with stat. 2 & 3 Vict. c. 12. This, however, is an offence against stat. 39 G. 3, c. 79; but it is clear that the act of Victoria does not extend to it, because this act, so far as it requires the Attorney and Solicitor-General to be parties to prosecutions, applies to the offence of unlawful printing defined by the act itself. If the act of Victoria had not created any offence, there might have been some ground for the argument now urged. As to the second objection: it is not contended that the statutory form has not been followed; and in general I should be disposed

(a) Stat. 39 G. 3, c. 79, s. 36, gives one moiety to the informer and the other to the king. Sect. 35 directs how penalties shall be recovered, and gives powers of distress and committal on non-payment, where the sum does not exceed 20*l*.

(b) It enacts that convictions by justices "for offences against this act, and adjudications of forfeitures of licenses," "and notices," &c., in pursuance of the act, "shall or may be in the several forms set forth for such purposes respectively in the schedule to this act annexed."

to say that where that had been done the conviction was good but some restrictions have been imposed upon that proposition, because, if the form given by the schedule does not contain all the particulars required to make out the offence, a court cannot say that an offence has been committed. That is an exception arising from the very nature of the thing. Here the form has been pursued, and that which has been omitted is not part of the description of the offence. It is argued from the cases of *Rex v. Seale*, 8 East, 568; and *Rex v. Helps*, 3 M. & S. 331, that the adjudication as to the penalty is defective because it does not furnish the convicted party with sufficient information. But the form is that which the act gives. Probably it was contemplated that some other mode would be found of supplying the requisite knowledge: but, if there is a defect in this, we cannot help it.

\*107} \*WILLIAMS, J. There might have been great weight in the second objection if no summary form had been given by the statute; and in *Rex v. Seale*, 8 East, 568, that was so. Where, indeed, a statutory form says, "Here set out the offence," it is well known to all persons conversant with such matters that the form gives no great help, and that all the facts must be stated which constitute the offence. There the kind of point now made is fully open, and the objections we have heard would apply. But here a form is given for that part of the conviction which awards the penalty: and there is no reason that it should not be followed. I do not think there is any probability of that continued imprisonment which has been mentioned as the consequence of such a form: but it is enough to say that, the form being given, more need not be added.

WIGHTMAN, J.(a) The result of the two statutes referred to is that certain offences are created by the first, and other offences by the second; and the second enacts that, for offences under that statute, an informer, as such, is not to prosecute. The restriction clearly applies to those offences only. As to the second objection, the cases deciding that a statute form is insufficient if it gives an incomplete description of the offence do not apply. The clause objected to here is not descriptive of the offence; and it follows a precise form prescribed by the statute. Inconvenience may possibly result; but it is not likely that, in general, the party convicted should not know who is the informer.

Conviction affirmed.

(a) Coleridge, J., was absent on account of indisposition.

**\*The QUEEN against The Inhabitants of ACTON. *Wednesday, [*\*108  
*November 19th.***

A parish consisted of eight townships. Overseers were appointed annually, sometimes one for each township, sometimes one for two or more townships and others for the rest, and sometimes four for the whole district. There were churchwardens for the whole parish. An equal poor-rate was always agreed to, at a general parish vestry, by the churchwardens and overseers; and the rate of allowances to paupers was settled at such vestries. Separate poor-rates were made, allowed and published, and the money collected by the overseers in the townships for which they acted, and paid by them to the poor of their districts respectively. Those who had a surplus brought it to the parish vestry, and it was applied in aid of those who were deficient; if any balance remained, it was placed to the general account and handed to the new overseers for the next year's expenses. In 1833, under a mandamus, the townships were divided, and became entirely separate in the appointment of overseers and management of the poor. Pauper, in 1815, gained a settlement by hiring and service; every thing which conferred the settlement taking place in G., one of the above townships. From 1815 to 1844 she received relief from G., while residing elsewhere. On appeal against an order made in 1844, removing her to G., the sessions quashed the order, subject to a case raising the question whether, on the above facts, the pauper was settled in G.

*Held*, that the settlement gained in 1815 did not confer a settlement in the newly separated district of G. And that relief given by G. was only evidence, on which the judgment of the sessions was conclusive.

Order of sessions confirmed: though the notice of grounds of appeal was signed only by the overseers of G., and not by the churchwardens of the parish in which the eight districts lay, and the sufficiency of the signature was a question submitted in the case.

On appeal against an order of two Justices, (July 17th, 1844,) removing Mary Lloyd, widow, from the township of Acton in the parish of Wrexham, Denbighshire, to the township of Gwersyllt in the parish of Gresford, in the same county, the sessions quashed the order, subject to the opinion of this court on the following case.

The parish of Gresford, at the time the pauper's late husband was hired and served in the appellant township of Gwersyllt as hereinafter mentioned, consisted of ten townships: namely, Gresford, Allington, Burton, Llay, Gwersyllt, Erlas, Erthig and Borrass Riffre, in Denbighshire, and Marford and Hoseley, in Flintshire. The parish church is in the township of Gresford; and there are four churchwardens for the whole parish, who at present only act in ecclesiastical matters.

The two townships in Flintshire have always had their own overseers, and maintained their own poor separately and apart from the rest of the parish.

\*The other part of the parish, consisting of the eight Denbighshire townships, as far back as can be traced previous to 1816, [*\*109* had overseers of the poor as follows:—one for Gresford, one for Allington, one for Burton and Llay, and one for Gwersyllt, Erthig, Erlas and Borrass Riffre, (the three latter being minor townships;) except in the years 1835, 1836 and 1837, when one overseer was appointed for the township of Gwersyllt alone. In 1816, one overseer was appointed for Gwersyllt alone, also one for every other township separately. In 1817, one was appointed for Gwersyllt, Erlas, and Erthig jointly, and one for every other

township separately. In 1818, one was appointed for Gwersyllt, Erthig, Erlas, and Borrass Riffre jointly, and one for each of the other townships separately; and, in 1819, and every year from then up to 1830 inclusive, one was appointed for Gwersyllt separately, and for all the other townships separately, except Erthig, Erlas and Borrass Riffre, which had one overseer for them jointly. Thus the number of overseers varied from four to eight at different times.

From (a) 1831 and 1832 there were four overseers appointed to serve for the whole parish of Gresford in the county of Denbigh, with the churchwardens thereof: and these are the only instances that can be discovered where there were warrants of appointment of overseers "for the parish," as one division, the other previous appointments being for the several townships, as before set forth. An equal poor rate of so much in the pound was always agreed to at a general vestry in the parish church, by  
 \*110] the churchwardens of the parish and the \*overseers; and the rate of allowances to be paid to paupers was arranged and ordered by parish vestries. Separate poor rates were made, allowed by the justices, published in the church, and collected by the overseers in the townships for which they were so appointed and acted as hereinbefore stated; and they also, previous to the appointment of an assistant overseer as hereinafter mentioned, paid the poor belonging, or supposed to belong, to the several townships; and the general accounts of the overseers for the townships at the end of each year were settled in the parish vestry, and the balance of their several accounts struck; and the overseers who had a surplus in hand, brought that surplus to the parish vestry; and those who were deficient received what was due to them from the surplus of the others: and, if any balance afterwards remained in hand upon the general account, it was paid over to the new overseers for the general expenses of the ensuing year. One of the churchwardens, in or about 1823, was elected in the parish vestry, and afterwards acted (with a salary) as a general overseer for the Denbighshire part of the parish, consisting of the said eight townships, and the several overseers paid the rates collected by them in their several townships to the person so acting as general or assistant overseer; and he paid the poor belonging to the several townships in the Denbighshire part of the parish, and kept a distinct account for each township. That part of the parish formed of the Denbighshire townships, from the year 1730 to 1833, always removed and received paupers under orders of removal drawn as from or to the "parish of Gresford, in the county of Denbigh;" but it cannot be ascertained that they ever removed paupers  
 \*111] to or from each other; but the Flintshire \*townships of Marford and Hoseley removed paupers to the Denbighshire part of the parish of Gresford; and, on the 11th of January, 1787, an appeal, touching the removal of Hannah Jonas, wife of Roger Jonas, and her five children, from the lordship of Marford and Hoseley to the parish of Gresford

(a) "For" seems to have been intended.

was tried at Mold, in the county of Flint; and the order was confirmed, with costs.

In the year 1832, an application was made to the justices of the peace for the division of Denbighshire in which the parish is situate, to appoint two overseers of the poor of the township of Allington, being one of the said townships in the parish of Gresford; and, upon their refusing, the inhabitants of Allington applied to the Court of King's Bench, and obtained a rule for a mandamus to compel such appointment; which rule, without argument, was made absolute: and the justices of Denbighshire, in obedience thereto, in April, 1833, appointed two overseers of the poor for the said township of Allington, and for each of the other Denbighshire townships, including Gwersyllt: and from that time two overseers have been regularly appointed for each township, which has since managed its own affairs entirely separate, and without interference with or by any others.

The pauper, Mary Lloyd, was married to her deceased husband, Ellis Lloyd, about the year 1772, at Gresford, Ellis Lloyd having, the year previously, viz., 1771, gained a settlement in the appellant township, by hiring and service, and (a) died in the year 1815. A few months after the death of her husband, the pauper received regular relief from the overseers of the poor of the appellant township of Gwersyllt, and continued to do so up to the formation of the Wrexham Union in 1837, and subsequently from the relieving officer on account of the said township of Gwersyllt until the 12th of April, 1844; during the whole of which time the pauper was living in the township of Acton, and not having done any act to gain a settlement since her husband's death. [\*112]

The statement of the grounds of appeal was signed by the two overseers of the appellant township only, and not by either of the churchwardens of the parish of Gresford.

The questions for the opinion of the court are: First, whether the grounds of appeal are properly signed in compliance with the 81st section of stat. 4 & 5 W. 4, c. 76; and, secondly, if they are properly signed, whether, upon the foregoing facts, the pauper, Mary Lloyd, is settled in the said township of Gwersyllt.

If the court should be of opinion that the grounds of appeal are properly signed, and that the pauper is not settled in the township of Gwersyllt, the judgment of sessions to be confirmed; but, if the court should be of opinion either that the grounds of appeal are not properly signed, or that the pauper is settled in the township of Gwersyllt, then the judgment of sessions to be quashed.

*Dowling*, Serjt., and *G. Hayes*, in support of the order of sessions. As to the signature: if the churchwardens of this parish must join in an appeal from any township, they must join in a removal; and then, if a pauper were removed from one township in the parish to another, there

could be no appeal, the churchwardens being parties to the removal. On  
 \*113] the point \*of settlement, *Regina v. Tipton*, 3 Q. B. 215, and  
*Regina v. Hunnington*, 5 Q. B. 273, are conclusive. The relief  
 granted since the subdivision (and commenced before the decision of *Re-*  
*gina v. Tipton*, might be *prima facie* evidence of a settlement in Gwersyllt,  
 but cannot weigh against the other facts. It was clearly given under  
 mistake.

*Arnold*, *contra*. As to the second question in the case: the husband's  
 settlement, from which the pauper derives hers, was gained before the  
 division of the townships in 1833. Down to that time, Gwersyllt was  
 a district maintaining its own poor as a parish; its poor-rate was not part  
 of a general contribution to a joint fund; the case differs in this respect  
 from *Regina v. Marriott*, 12 A. & E. 35, note (c). [Lord DENMAN, C. J.  
 How do you distinguish it from *Regina v. Tipton*?] The Denbighshire  
 townships in this case had not a common fund for maintenance of the  
 poor; separate poor-rates were raised: and, although the surplus of any  
 rate which yielded one was carried to a general account, that may not  
 have been legal. The case, therefore, does not fall within the rule es-  
 tablished by the late decisions, that, when a parish becomes divided into  
 districts, a person originally settled in the parish cannot claim a settle-  
 ment in the district newly formed from that part in which he resided.  
 Here the township of Gwersyllt did exist as a district for some parochial  
 purposes, before the division. [WILLIAMS, J. Surely it only comes to  
 this, that there was evidence both ways. And the sessions have quashed  
 \*114] the order.] As to the relief, parties cannot \*dispute its effect as  
 an admission, after having given it for thirty years.

Lord DENMAN, C. J. There is no difficulty in this case. *Regina v.*  
*Tipton* clearly applies. There could be no settlement of the husband in  
 the township of Gwersyllt; and therefore the relief can have no effect.  
 It was, at any rate, only evidence; and the sessions have found against  
 it.

WILLIAMS and WIGHTMAN, Js., (a) concurred.

Order of sessions confirmed.

(a) Coleridge, J., was absent on account of indisposition.

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LOCKWOOD against WOOD. Friday, November 21st.

(On motion after the third trial.)

Reported, 6 Q. B. 67, note (a).



**\*LEONARD PERRY, surviving Executor of WILLIAM NASH, [\*115  
against SLADE. *Saturday, November 22d.***

August, 1844, defendant gave plaintiff a promissory note for 23*l.* 2*s.* 6*d.*, which the note described as being the amount of interest due on a promissory note for 117*l.* 4*s.*, dated 6th July, 1838, up to 6th July, 1844. *Held* to be evidence for a jury of an account stated, in August, 1844, of a then subsisting debt of 117*l.* 4*s.*

**Assumpsit.** The first count was on a promissory note, made by defendant on 12th July, 1833, in Nash's lifetime, at six months, for 112*l.* 14*s.* 6*d.*, with interest at 4 per cent., for value received; and it alleged a promise to the testator. There were also counts for money lent by testator, money had and received to his use, and for money paid by him, and on an account stated with him, all laying the promises to the testator. And there was a count on the promissory note, laying the promise to the executor; and a count on an account stated between the defendant and the present plaintiff as executor.

**Pleas:**(a) 1. To the counts on the note, that defendant did not make the note. Issue thereon.

2. To all the counts but the first, Non assumpsit. Issue thereon.

3. To all the counts laying the promises to the testator, a set-off. Replication, denying the set-off. Issue thereon.

4. To the whole declaration, payment to and acceptance by plaintiff in satisfaction. Replication, denying the payment and acceptance. Issue thereon.

5. To all the counts laying the promises to the testator, *actio non accrevit infra sex annos*. Replication, that the causes, &c. did accrue within six years. Issue thereon.

\*On the trial, before PLATT, B., at the last Wiltshire assizes, the plaintiff proved the making of the promissory note; and, in support of the issue joined on the second plea so far as it related to the last count, he put in a promissory note, signed by defendant, of which the following is a copy. [\*116

“23*l.* 2*s.* 6*d.*

*Devizes, August 8th, 1844.*

“Five months after date I promise to pay Mr. L. Perry, or order, the sum of 23*l.* 2*s.* 6*d.*, being the amount of interest due on a promissory note (b) from the undersigned to the late W. Nash of Patney, for 117*l.* 4*s.*, dated 6th July, 1838, up to the 6th of July, 1844. JOHN SLADE.”

The learned judge told the jury that there was no evidence to take the note of 1833 out of the statute: but he left it to them whether on this evidence they found an account stated between the plaintiff and the defendant for 117*l.* 4*s.* The jury found for the plaintiff: and a verdict was entered for him on the issues relating to the last count.

(a) There were pleadings as to small sums, parcel, &c. which it is unnecessary to notice.

(b) This note was not mentioned in the declaration; but the plaintiff endeavoured to shew that it was given in renewal of the note of July 12*th.*, 1833, there mentioned.

In this term, *Crowder* obtained a rule nisi for a new trial on the ground of misdirection.

*Butt* and *Barstow* now showed cause. The note of August 8th, 1844, contained a distinct admission that a debt, arising from the note of 1838, was due. That is evidence of an account stated; *Highmore v. Primrose*, 5 M. & S. 65. But the defendant contends that the admission was  
 \*117] only \*that a debt was due on 6th July, 1844. Such an admission, however, unaccompanied with any thing leading to infer payment since, is, at least, evidence of an account stated as to a debt existing up to the time of the admission.

*Crowder* and *Montague Smith*, contra. It is not contended by the plaintiff that there was any answer to the plea of the Statute of Limitations; nor is the count on the note, laying the promise to the plaintiff, insisted on. The question, therefore, turns on the count alleging an account stated with the plaintiff, to which the statute is not pleaded. Now, the only evidence is that, on 8th August, 1844, the defendant admitted that interest was then due, having accrued on 6th July, 1844, in respect of a note. That does not show that the principal was admitted to have been due on 8th August, or even to be due on 6th July, for interest might be due in respect of principal just paid off, or not yet due, as where a debt is to be paid at a future time with interest in the meanwhile. It is no more than if a party, in August, were to write a letter stating that he had been indebted in July: that could not be an account stated of a debt due at the time of writing: A count on an account stated must be proved by admission of a balance due at the time; *Tucker v. Barrow*, 7 B. & C. 623, which was distinguished on this ground from *Knowles v. Michel*, 13 East, 249, and *Highmore v. Primrose*, 5 M. & S. 65, and was recognised in *Lubbock v. Tribe*, 3 M. & W. 607. [WIGHTMAN, J. Suppose the acknowledgment had been that interest was due, on an account stated.]

\*118 That would not be \*evidence of an account stated at the time of the acknowledgment. It is not necessary to consider whether this evidence might not support a count for money had and received.

LORD DENMAN, C. J. The debt on the note mentioned in the declaration is barred by the statute. But the question is as to the effect of the writing of 8th August, 1844. Now that is a statement, made on 8th August, that interest was then due which had accrued up to 6th July. That is surely some evidence that the parties, on the 8th of August, agreed that the principal was due on the 6th of July, and evidence also, in default of proof of payment, that it was still due. Indeed the probability is against the payment of interest after payment of the principal. It seems much like the common case of an I. O. U. We do not interfere with former decisions. In *Tucker v. Barrow*, 7 B. & C. 623, there was only an extorted admission of money having been received at a time past.

WILLIAMS, J. The question lies within a very narrow compass. Did the promissory note of August, showing that interest accruing in July was

still due, furnish evidence for a jury that the principal was agreed by the parties to be due in August? I think it did; and there was nothing from which we can infer that the principal had been paid.

WIGHTMAN, J.(a) The whole question is, whether there was evidence of an account stated with the executor: \*the Statute of Limitations has nothing to do with this. I think the note of August is evidence [\*119 of an account stated between the executor and the defendant. Then what is the statement? Of a debt of 117*l.* 4*s.*, which is recited as existing so as to carry interest, for which interest, up to 6th July, the note is given. Then is there any thing to raise a presumption that the parties in August treated the principal as paid? Nothing of the kind appears: the jury, therefore, might infer that they then stated an account leaving the 117*l.* 4*s.* due. Rule discharged.

(a) Coleridge, J., was absent.

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**HENRY WRIGHT against ELIZA ANNE MADOCKS and Others.**  
*Monday, November 24th.*

Where final judgment has been obtained against a defendant who dies before execution, and a scire facias has issued (after rule to show cause) against his personal representative, to revive the judgment, and has been returned, a scire facias may issue, without a rule to show cause, against the heir and tertenants, though the judgment be more than fifteen years old. R. Gen. Hil. 2 W. 4, I. 79, applies to the first scire facias reviving the judgment in such case, but not to the second.

In Hilary Term, 1812, Henry Wright, the present plaintiff, signed judgment against William Alexander Madocks for 10,000*l.* debt and 80*l.* damages, on a warrant of attorney given to secure an annuity. In 1828, W. A. Madocks died, having made a will and appointed executors, who renounced probate and execution. Limited letters of administration of the estate of W. A. Madocks were then granted by the Prerogative Court of Canterbury: and on 27th December, 1842, letters of administration cum testamento annexo, of that date, of the rest of the goods, chattels and credits of \*W. A. Madocks were granted by the Prerogative Court [\*120 of Canterbury to Meyrick Humphreys Edwards.

On 19th January, 1843, a rule was obtained, calling on Edwards to show cause why a scire facias should not issue to revive the judgment against W. A. Madocks; and on 31st January, 1843, this rule was made absolute, no cause being shown.

Afterwards the scire facias issued, directing the sheriff to summon Edwards to show if he had or knew, &c., why Wright should not have execution against him for the debt and damages.

Edwards was served with notice, by the sheriff, of this writ; and the sheriff returned scire feci accordingly: but Edwards did not appear.

On 26th April, 1843, a scire facias issued, directing the sheriff to make known to the heir and tertenants of W. A. Madocks that they should be

before, &c., to show if they or either of them had or knew, &c., why the debt and damages ought not to be made of the lands, &c.

The present defendants were served with notice, by the plaintiff, of this writ.

On 31st May, 1843, *E. V. Williams* obtained a rule to show cause why the scire facias last mentioned should not be set aside. The affidavits in support of the rule showed that this writ had been issued without any rule to show cause.<sup>(a)</sup>

The affidavits in answer to the present rule showed that judgment on the scire facias against Edwards was signed by default.

\*121] *\*Jervis* and *Welsby* now showed cause. The defendants rely upon R. Gen. *Hil.* 2 W. 4, I. 79, (b) which orders that "A scire facias to revive a judgment more than ten years old, shall not be allowed without a motion for that purpose in term, or a judge's order in vacation, nor, if more than fifteen, without a rule to show cause." The judgment is here more than fifteen years old; and therefore it has been revived against the administrator, by the first scire facias, upon a rule to show cause being made absolute, as the general rule requires. The second scire facias, which it is now sought to set aside, is not to revive the judgment, (which was already revived,) but to fix the heir and tertenants with execution. No rule to show cause is necessary for that purpose. The language of the two writs differs materially.

Sir *F. Kelly*, Solicitor-General, and *E. V. Williams*, contra. The object of the general rule is that a party should not be fixed by proceedings of which he has not notice. The scire facias against the heir and tertenant revives the judgment as much as the scire facias against the personal representative; each proceeding is simply for the purpose of obtaining execution on an old judgment. Neither writ uses the expression of "reviving" the judgment. The meaning of the phrase may be inferred from the language in *Garnon's Case*, 5 Rep. 88 a, 88 b, where "execution" is said to be "the life of the law." In 2 Tidd's Practice, 1103, ninth edition, it is said: "The reason why the plaintiff is put to his scire  
\*122] facias after the year is, because \*when he lies by so long after judgment, it shall be presumed that he hath released the execution." The intention, in each case of scire facias, is, according to the language of the statute of Westminster 2d, (1 stat. 13 Ed. 1, c. 45,) to "give knowledge to the party of whom it is complained." The complaint, in the case of the heir and tertenant as well as in that of the personal representative, is made against the party to be charged with the execution. Suppose the first scire facias here had been issued against the heir and tertenants, could another have been issued against the administrator without a rule to show cause? [*Jervis*. The scire facias against the personal representative is a necessary first step. WIGHTMAN, J. That is shown in note (4) to *Underhill v.*

(a) Other objections were made, which were not insisted upon in argument.

(b) 3 B & Ad. 385.

*Devereux*, 2 Wms. Saund. 72 s, 6th ed. The case there referred to, *Panton v. Tertenants of Hall*, Carth. 105, 107, does not support the proposition; the dictum relied on occurs in the argument of counsel for the unsuccessful party; the question there was as to the position of parties where one of two defendants dies between final judgment and execution. It may well be that a tertenant may have cause to show of which the personal representative is ignorant or cannot take advantage.

LORD DENMAN, C. J. I think it is clear from the oldest, latest, and best authority that this rule must be discharged. The scire facias against the administrator issued properly, and revived the judgment; the judgment being revived, the scire facias issues at once, calling upon the heir and tertenants to show why the lands should not be delivered in pursuance of such judgment. \*If these parties have any defence, they can [\*123 plead it in answer to the second scire facias.

WILLIAMS and WIGHTMAN, Js., (a) concurred. Rule discharged.

(a) Coleridge, J., was absent.

**Ex parte the Inhabitants of WELLINGBOROUGH. Tuesday, November 25th.**

Appellants against an order of removal stated, amongst other grounds of appeal, some of which affected the merits of the settlement, that the examinations did not contain sufficient evidence of chargeability. On the trial of the appeal, the respondents, who had given no notice of intention to abandon the order, stated that they could not support it against the above objection, and, without going farther into the case, moved the court to quash the order on that ground, and make a special entry. The appellants stated that they did not rely on that objection, and called upon the court to hear and determine the appeal on the other grounds: but the court refused, and quashed the order, with a special entry that they did so, after a full hearing, on the ground of the objection to the proof of chargeability.

*Held*, that the decision was right, and this court refused a mandamus to enter continuances and hear the appeal on the merits.

FLOOD moved for a rule calling upon the justices of the peace for Northamptonshire to show cause why a mandamus should not issue, commanding them to enter continuances and hear the appeal of the inhabitants of the parish of Wellingborough against an order of two justices for that county, removing Lois Bayes and her two children from the parish of Isham to the parish of Wellingborough, both in Northamptonshire.

He moved on an affidavit which stated, in substance, that the appellants had served a statement of grounds of appeal, some of which raised objections to the examinations, and others denied the facts on which the pauper was alleged to be settled in the appellant parish. The third ground of appeal was that the examinations contained "no legal or sufficient evidence that at the time of the application for the said order, or at the time of the \*making of the same, the said Lois Bayes and her said two children were actually chargeable" to Isham. The [\*124

respondents gave no notice of intention on their part to abandon the order, or to move that it should be quashed on any particular ground: but, when the appeal came on to be tried, at the Michaelmas sessions, 1845, service of notice and grounds being admitted, the respondents stated that, so far as regarded the objections set forth in the third ground of appeal, they could not support the order; and they moved the court to quash it on that ground only, and to make a special entry.

The appellants thereupon stated to the court that they did not rely upon the objection stated in the third ground of appeal, and called upon the court to hear and determine the appeal on the other grounds: but the sessions refused to go into any other part of the case, and quashed the order, with a special entry that it was quashed, after full hearing, for want of proof of chargeability before the removing magistrates.

*Flood* contended that the appellants had a right to give up any one or more of their grounds of appeal: and, as the sessions had thought proper to decide the case on a technical ground which had been abandoned, this court would compel them to try the appeal on its substantial merits. [Lord DENMAN, C. J. I do not see how that can be done, nor what reason you have to complain. The sessions have heard and determined the appeal; and the decision is in your favour.] After such an entry, the respondents may take out a fresh order for the removal of the same paupers to the appellant parish, and, on the trial of an appeal against that order, may adopt the same course, and harass the appellants with continued litigation. Though the objection was brought especially to their notice, they gave no intimation of their intending to yield to it: they ought at least to have served notice of abandonment, as was done in *Ex parte the Overseers of Pontefract*, 3 Q. B. 391.

Lord DENMAN, C. J. The respondents, whether they had given notice of abandonment or not, had a right to say, when the appeal came on for trial, that they found they could not sustain their order against a particular objection, and would therefore go no farther. After that declaration it would have been useless for the sessions to proceed with the appeal. If appellants choose to raise technical objections which do not affect the real question between the parties, they must, at all events, be content to have them decided in their favour.

WILLIAMS, J., concurred.

COLERIDGE J. The sessions might have done much injustice by going into facts under these circumstances. It is quite possible that the respondents, having their attention called to this objection, took advice, and, finding that the objection was fatal, did not come prepared with evidence in support of the order on the merits of the settlement. They could not know that the objection would be waived.

WIGHTMAN, J., concurred.

Rule refused.(a)

(a) Reported by R. Hall, Esq.



**'BLAND against DAX. Tuesday, November 25th. [\*126**

In a cause of A. against B., the matter was by rule of court referred to the Master. A. died before the Master's report was read. The executors obtained a rule to show cause why they should not be made parties to the first rule.

*Held:* 1. That it was not necessary that the second rule should be drawn up on reading the first, provided it adverted to the first, which was in court.

2. That the second rule, and the affidavit on which it was grounded, ought not to be entitled "A., deceased, against B.;" and, the rule and affidavit being so entitled, the rule was discharged.

PETERSDORFF, in Hilary term, 1843, obtained a rule, which was as follows:

*"Bland, deceased, against Dax.*

*"Upon reading the affidavits of James Bland, Esq., filed in this cause in Trinity term, 1841, another affidavit of the said James Bland, filed in this cause in Easter term last past, and the affidavit of Edward Rouse, Esq. and another, filed this day, it is ordered that George Samuel Ford, an attorney of this court, upon notice of this rule to be given to him, shall, upon Tuesday, the 17th day of January instant, show cause why the said Edward Rouse and James Devereux Hustler, executors of the late plaintiff in this cause, in the last-mentioned affidavit respectively named, should not be at liberty to become parties to the two several rules made in this cause, respectively, on the 11th of June, 1841, and the 22d of November, 1841, instead of the said late plaintiff, James Bland, deceased, and why the said executors should not be entitled to receive any money or moneys directed, or to be directed, by the court, to be paid under the said rules, or in any other respect the court may order."*

The affidavit, filed in Hilary term, 1843, on which this rule was obtained, was entitled, "Bland, deceased, plaintiff, against Dax, defendant." It appeared that, on the 11th June, 1841, a rule had been obtained, "in the above-mentioned cause," calling upon Ford to show cause why he should not deliver to the plaintiff, Bland, "an account of certain moneys received and payments made, and pay the balance to the plaintiff, and also pay a sum of 1050*l.*, with interest, to plaintiff, and render an account of the proceeds of "a certain execution issued against the said defendant," and pay the amount, or such part thereof as was unpaid, to plaintiff. Cause was shown against this rule on 22d November, 1841, when it was ordered that the matter should be referred to the Master. The Master prepared his report; and counsel was instructed, in Michaelmas term, 1842, to hear the report read, but was unable, from pressure of business, to do so. Bland died on 25th December, 1842. In this term,<sup>(a)</sup>

Sir F. Thesiger, Attorney-General, and Ogle showed cause. The rule should have been drawn up on reading the former rule. [Lord DENMAN, C. J. (after conferring with the officers of the court.) It appears to be

(a) November 5th. Before Lord Denman, C. J., Williams, Coleridge, and Wightman, Ja.  
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sufficient that the present rule adverts to the former rule, which is in court.] The rule and the affidavits are wrongly entitled. The suit is abated. Even if the Master had made his award before Bland's death, it could not have been enforced after the death: *Rex v. Maffey*, 1 Dowl. P. C. 538. There is no such action as Bland against Dax; and there never was such an action as Bland, deceased, against Dax. Perjury could not be assigned on such affidavits, they not being made in any proceeding in court.

\*128] \*Sir F. Kelly, Solicitor-General, contra. It appears that execution had issued, in the action of Bland against Dax, before the plaintiff's death. The action therefore did not abate. There is no other mode of entitling the rule and affidavits. The executors may enforce their right, in respect of Ford's liability as attorney to the late plaintiff, not only by action, as in *Knight v. Quarles*, 2 Br. & B. 102, but by motion, as in the case *In the Matter of Aitkin*, 4 B. & Ald. 47. The proceeding may be considered as an equitable scire facias. The title may be rejected: at any rate the word "deceased" makes no necessary part of the title of the cause; it merely adds to the title of the cause the information that the plaintiff is dead. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court.

It was objected that, in consequence of the word "deceased" being introduced into the titles of the rule and affidavits, the titles were wrong. We think this objection must prevail; and the rule must therefore be discharged. *Rule discharged.*

\*129] \*In the Matter of KING, Gent., One, &c. *Tuesday, November 25th.*

An attorney of this court was convicted and received judgment on an indictment charging a conspiracy to defraud parties of goods, and that, in pursuance thereof, one conspirator obtained the goods on credit, and the attorney seized them by a collusive execution which he sued out against such conspirator. Judgment was reversed for insufficiency of the indictment.

*Held:* a sufficient ground for striking him off the roll, though no affidavit was made that he had committed the offence, but only that he had been convicted; and though he deposed that the money produced by the execution was justly due to him from such alleged conspirator, and denied that he had been "a party or privy to such criminal conduct," as was stated in the indictment, or that it contained any offence punishable by law; the affidavit not specifically denying the conspiracy, or that the act charged was done in pursuance of it.

F. ROBINSON, in Michaelmas term, 1844, obtained a rule calling upon William Henry King, an attorney of this court, to show cause why he should not be struck off the roll.

The affidavits on which this rule was obtained were sworn on 21st November, 1844, and stated that King, together with others, was indicted at the Central Criminal Court for conspiracy, the indictment containing several counts. That a true bill was found, and the indictment removed into this court by certiorari, and that King and two other defendants pleaded

Not guilty. That, on the trial at Westminster, before WILLIAMS, J., King and another defendant, Emily Ann Birch,<sup>(a)</sup> were convicted on the first count, and acquitted on the others; and King was sentenced to be imprisoned for eighteen calendar months. That, in Easter term, 1844, King obtained a rule to arrest the judgment, which rule was discharged in the same term.<sup>(b)</sup> That, on 27th May, 1844, King sued out a writ of error, which was non-prossed, 6th August, 1844, in consequence of his delay in proceeding with it. That, on or about 5th November, 1844, King sued out another writ of error, and gave notice of the allowance thereof; but that he had not, to \*the knowledge and belief of the party [\*130 deposing to this fact, proceeded therewith; and deponent was advised and believed that there was no valid ground for the writ of error. The affidavits set out the first count of the indictment, which charged that the defendants “did unlawfully combine, conspire, confederate and agree together to cheat and defraud certain liege subjects of our lady the queen of divers large quantities of their goods and chattels;” that, in pursuance of the conspiracy, one of the defendants, E. A. Birch, obtained goods from certain tradesmen named, and also from certain parties whose names were unknown, and, in order that the goods might be taken in execution as after mentioned, ordered them to be delivered at her home, and procured them to continue there; that, in further pursuance of the conspiracy, King, E. A. Birch, and another defendant, A. D. Phillips, “did falsely and fraudulently pretend that certain debts were due and owing” from E. A. Birch to King and Phillips respectively; and King and Phillips did, by collusion with E. A. Birch, commence separate actions against Birch, in which judgments were collusively signed for want of a plea; and afterwards, in further pursuance of the conspiracy, writs of *fi. fa.* were collusively sued out by King and Phillips, by means of which the goods, obtained as aforesaid, were taken in execution: and so the jurors, &c. that King, E. A. Birch, Phillips, &c., “in manner and by the means aforesaid, unlawfully did cheat and defraud” the tradesmen who supplied the goods. The affidavits did not contain any assertion that King had, or that the deponents believed he had, been guilty of the conspiracy.

In answer, King made affidavit, sworn 5th January, \*1845, that [\*131 the proceedings in the action by himself, alleged in the indictment to be collusive, had led to an issue, which had been found against King, but in which a bill of exceptions had been filed and error brought, which case, as well as two cross rules nisi, one for quashing that writ of error, were then standing for argument in the Court of Exchequer Chamber.<sup>(c)</sup> That, on a consultation of King’s counsel upon the indictment, it was considered that many counts thereof were bad and others could not be proved, and it was therefore decided not to call witnesses for King, but to rely on ulterior proceedings. King further stated circumstances for the purpose

(a) See the first count of the indictment in *Regina v. King*, 7 Q. B. 782.

(b) See 7 Q. B. 782—795.

(c) See *King v. Simmonds*, 7 Q. B. 289; *King v. Birch*, 7 Q. B. 799.

of showing that the delay in proceeding with the writ of error on the indictment was owing to the attorney for the prosecution. That he, King, had delivered an assignment of errors, intended to proceed, and was advised and believed that there were valid and substantial grounds of error, and that judgment would be given for him. That the indictment had been artfully and designedly preferred to prejudice him in the civil proceedings. That the judgment and execution in such proceedings were for moneys justly due from E. A. Birch to him. That, "although the aforesaid jury returned a verdict of Guilty against this deponent and the said E. A. Birch upon the said first count of the said indictment, this deponent denies being a party or privy to such criminal conduct, or that it contains any misdemeanor or offence which, by the laws and statutes of this realm, is punishable by indictment." There were also numerous affidavits by other parties deposing generally to the integrity of King.

\*132] In this term, (a)

*Pashley* showed cause. No charge is now made substantially against King. The deponents rely exclusively upon the conviction, without deposing to its justice. Now the writ of error has been argued, and the judgment of this court reversed; (b) and King has been discharged by this court. These proceedings put an end to the indictment. But, even if that were not so, the indictment shows no ground for this rule. The first count, on which alone King was convicted, can hardly be said to charge distinctly even a moral offence. The overt acts, as the Court of Exchequer Chamber points out (c) in distinguishing the case from *Rex v. Spragg*, 2 Burr. 993, do not amount to any offence: and the conspiracy is not distinctly and positively alleged. Mere conviction of a conspiracy does not subject a party to be struck off the roll; *Re —*, 1 Dowl. P. C. 174. In *Ex parte Brounsall*, 2 Cowp. 829, where the attorney was struck off the roll for having been convicted of felony, the felony was a theft. Misconduct in a cause has been also held to be a sufficient ground, that affecting the professional character of the attorney: *Stephens v. Hill*, 10 M. & W. 28. But here is nothing equivalent.

\*133] \**F. Robinson*, contra. The judgment has been reversed only because it technically fails to describe, without ambiguity, a criminal act. But no attempt has been made to set aside the verdict as against evidence. This court therefore has to consider, not the question which was decided by the Exchequer Chamber, namely whether the acts charged constitute a misdemeanor properly described, but whether such acts are of a character rendering the party unfit to be an attorney. (d) There is a charge of being a party to a collusive judgment: that imputes an act

(a) November 13th. Before Lord Denman, C. J., Williams, and Wightman, Js.

(b) On June 14th, 1845. See *King v. The Queen*, 7 Q. B. 795—810. On the present rule being brought forward while the writ of error was pending, this court directed that the argument should stand over till the Court of Exchequer Chamber had pronounced judgment.

(c) 7 Q. B. 808.

(d) As to the question, how far, on indictment for conspiracy, the overt acts are essential to the charge, see 2 Russ. on Crimes, 691, &c., (3d ed. by Greaves.)

which is specifically professional misconduct. The denial contained in King's affidavit is not sufficiently precise to be acted upon.

*Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court.

The attorney in this case has been convicted of a misdemeanor; and the indictment sets forth acts amounting to very fraudulent practices. The Exchequer Chamber thought the indictment bad. We are now pressed with the argument that all done under the indictment is to be set aside. But the reversal does not interfere with the verdict of the jury finding the facts. The present proceeding, as was laid down in *Ex parte Brounsall*, 2 Cowp. 829, is not a punishment for a legal crime, but an exercise of the discretion of the court upon the question "whether a man whom they have formerly admitted, is a proper person to be continued on the roll or not." In this case it is not very clear \*that King did not commit the acts charged in his professional character of attorney; for one part of the fraud imputed to him was said to be effected by taking out warrants of attorney. We think that the indictment and the verdict must be valid to the extent of preventing the attorney from having our sanction to practice. In his affidavit he denies being a party or privy to criminal conduct, or that the indictment contains an offence punishable by the law of the realm: but he does not deny the commission of the acts charged in the indictment. We must not, merely because the indictment is bad in point of law, shut our eyes to the fact that the jury have convicted him of conduct rendering him unfit to be an attorney. [\*134]

Rule absolute.

### JONES against CARTER. *Tuesday, November 25th.*

Defendant was the treasurer of a Derby lottery, and received the subscriptions. Tickets marked with the names of horses entered to run for the Derby stakes were issued to the subscribers; and it was understood that the holder of a ticket bearing the name of a winning horse would receive a prize in money. Defendant received 5s. for each ticket, and was to pay the prizes. The holder of a ticket purchased of defendant sold it to plaintiff. There was no written contract between any of the parties; and the party who bought of defendant subscribed as for himself. The horse named on plaintiff's ticket won. *Held*, that plaintiff could not recover the amount of the prize from defendant, there being no privity between them.

ASSUMPSIT for money had and received, and on an account stated. Plea: Non assumpsit. Issue thereon.

On the trial, before PATTESON, J., at the Middlesex sittings in this term, the following facts appeared. The defendant was the treasurer of a lottery called a Derby club, (a) in which a number of persons paid subscriptions of 5s. each, and prizes were awarded according to the \*event of the race to be run at Epsom on the 22d of May, 1844, for the [\*135]

(a) See *Allport v. Nutt*, 1 Com. B. 974, which related to a similar transaction, connected with the same race.

Derby stakes. The subscribers met before the race and drew for horses lots being prepared, on each of which was written the name of a horse entered to run for the stakes. There were no written rules: but it was understood that he who held the name of the horse which came in first at the race was to receive a prize of 22*l.*, and the prize for the second horse was to be 8*l.* One James subscribed to the lottery, paying his subscription to the defendant; and he drew a lot with the name "Ionian." Nothing passed in writing, except that James gave in his name as "Lord Collingwood," and received a ticket with the name "Ionian." This ticket he handed to the plaintiff, who paid him 5*s.* for it. The horse Ionian came in second: but, a dispute arising whether Ionian was not the third instead of the second horse, defendant refused to pay the 8*l.* on the ticket marked with that name. It did not appear that, before this dispute, the defendant had expressly assented to or dissented from the transfer. On the trial it was objected that the action did not lie, for want of privity between the plaintiff and defendant. The learned judge was of that opinion, and directed a nonsuit.

*Pigott*, in this term,<sup>(a)</sup> moved for a new trial. If the defendant received money from James, under an implied agreement to hold for the person to whom James might transfer his ticket, he constituted himself agent to that person for the purpose of paying over the stake that might be won. That agency distinguishes the case \*from *Baron v. Husband*, 4 B. & Ad. 611, and *Brind v. Hampshire*, 1 M. & W. 365; S. C. Tyr. & G. 790.<sup>(b)</sup> [PATTERSON, J. There was no agreement proved that the contract should be transferable. Your argument gives the ticket the effect of a promissory note.] If the defendant had paid the plaintiff, James would have been estopped from claiming the stake. [PATTERSON, J. Though James might not have been entitled to complain if the plaintiff had been paid, it does not follow that the plaintiff can sue.] If a creditor appoints that his debt shall be paid to a particular person, and the debtor promises the appointee to pay, the creditor cannot revoke the appointment; *Hodgson v. Anderson*, 3 B. & C. 842. The whole question here is, whether there was such a promise as between the defendant and plaintiff. [PATTERSON, J. The 5*s.* here could have been recovered back only by the party who paid it. The 8*l.*, at the time of the contract, was payable only on a contingency. The case most like the present is that in which a reward has been offered by advertisement to whosoever will give certain information. But no question on transfer of the interest has arisen in such a case.] In *Routh v. Thompson*, 13 East, 274, 282, where a question was whether an insurance effected by the plaintiff could accrue to the benefit of the crown, which was no party to the act of insuring, Lord ELLENBOROUGH said: "The party directing the insurance was appointed agent for the captors, which captors were themselves in one

(a) November 17th. Before Lord Denman, C. J., Patterson, and Williams, Ja.

(b) See *Belcher v. Campbell*, ante, p. 1.



sense the agents of the crown, and therefore it brings it to the same question. Then, by the terms of the letter of instruction for making insurance, the agent's correspondents were to 'do the \*best for the interest of the concerned.' The agent at the time did not know to whose benefit the prize would accrue, nor was it necessary that he should know the very persons interested; therefore he wrote for the insurance to be made for the benefit of those concerned: then, if it turn out that the interest to be insured was the interest of the crown, why may not the crown adopt it?" [PATTESON, J. The assured sued, not the crown.] The crown was in the situation of an unknown principal, and would have been entitled to come in and sue. If the appointment here was valid, it made no difference that the claim was subject to a condition, provided that were afterwards fulfilled: this appears from *Crowfoot v. Gurney*, 9 Bing. 372. The right of a principal, in whose name an agent has contracted, to reject or adopt the contract is explained in Smith's Merc. Law, 133, 134, (3d ed. book i. c. 5, s. 5,) where the difference is pointed out between the right of such principal "to adopt a contract, and a bare act, the effect of which would be to raise a duty towards him from a third party; which act, if unauthorized at first, cannot be confirmed by recognition. [PATTESON, J. How did James act for another in this case? Non constabat that he would ever part with the ticket. You make him agent, at the time of purchasing the ticket, for whomsoever he might transfer the ticket to, if he transferred it. There was no unknown principal in question when this ticket was taken. James professed to buy for himself.] *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court. This was an action for money had and received. The plaintiff was the holder of a ticket in a Derby lottery, and claimed as winner; but he was not the person to whom the defendant gave the ticket. That person had assigned to the plaintiff. We are of opinion that the nonsuit was right, and that the plaintiff cannot recover the sum demanded, as money had and received to his use, for want of privity between him and the defendant. There is no such privity, though it is admitted that the defendant held for the benefit of the plaintiff; the defendant's liability was to the assignor. Though there may have been a valid assignment, it was of a chose in action; and the law does not permit the party interested to sue on such a transfer. *Rule refused.*

END OF MICHAELMAS TERM.

## \*139]      \*MICHAELMAS VACATION.(a)

## In the Matter of the APPLIEDORE Tithe Commutation.

(In a commutation of tithes under stat. 6 & 7 W. 4, c. 71, the valuer made an apportionment, which was objected to by land-owners in the parish, and the objectors heard, first, by the Assistant-Commissioners, who received evidence for and against the objections, and, then, by the Tithe Commissioners, according to sect. 61.

It appeared that the tithes of corn and grain in the parish were payable to the rector, and moduses for all other tithes, to the vicar. A rent-charge, in lieu of such tithes and moduses, had been awarded under sect. 36. H., one of the above land-owners, held ancient pasture-land of the dean and chapter of Canterbury by lease, which forbade him to plough the land without their license in writing, for which he had never applied or purposed applying: but the lands of the dean and chapter within the same district had been ploughed within living memory. Part of the lands in the parish was woodland. The valuer, in apportioning the rent-charge, under sects. 33, 44, upon H.'s pasture-lands, assessed them to the vicar's rent-charge according to the modus, and added a small portion of rent-charge to be paid to the rector as part of the gross rent-charge awarded to him, where it seemed that the productive quality of the land admitted of its being arable, and that there was a woodland, not considering that a reasonable probability existed of that land becoming arable. The objectors disputed both the facts and the principle of assessment. The Commissioners, having inspected the evidence given as above stated for and against the objections, decided that they would confirm the apportionment if they were not forbidden by a superior court.

On motion for a prohibition, *Held*,

That a prohibition did not lie, the Commissioners having acted within their statutory jurisdiction, and according to law. And,

That the apportionment was right in principle.

BOTELER, in Michaelmas term, 1844, obtained a rule calling upon the Tithe Commissioners for England and Wales to show cause why a prohibition should not issue to prohibit them from confirming the instrument of apportionment of the rent-charges of the parish of Appledore in Kent. The rule ordered that notice thereof should be given to the attorney for the land-owners of the said parish, and to the impropiator and his lessee, and the vicar of the said parish. The following facts appeared on affidavit for and against the rule.

\*140] The parish of Appledore, in the Weald of Kent, lies \*partly in Romney Marsh and partly on uplands adjoining, and comprises about 474 acres of arable land, 2209 of pasture or meadow, and 68 of woodland, besides glebe lands, waste, &c. By custom, no tithes are payable in the Weald for woodland. The tithes of corn and grain in the parish are payable in kind, and belong to the Archbishop of Canterbury, who is the impropriate rector, and to his lessees. No other tithes in the parish are payable in kind: but moduses of 6*d.*, and 1*s.* per acre are paid to the vicar in lieu of all tithes except those of corn and grain.

A commutation being in progress, the Assistant Tithe Commissioner, Mr. Woolley, made his award, (September 2, 1841,) fixing the annual sum of 210*l.* as the rent-charge payable to the archbishop or his lessees in

(a) The Court sat in Banc, on the 4th, 5th, 6th, 8th, 9th, 10th and 11th of December.

lieu of the tithes of corn and grain, and 98*l.* 8*s.* 4*d.*, as the rent-charge payable to the vicar in lieu of all vicarial tithes and moduses. The charges were ascertained according to the average value of the tithes of corn and grain and the amount of the moduses, respectively, received in the parish for seven years preceding Christmas, 1835. The Commissioners confirmed the award.

The pasture lands in the parish of Appledore are for the most part ancient pasture or meadow, particularly those in Romney Marsh, which have been in grass from time immemorial. The dean and chapter of Canterbury are the owners of 107 acres of pasture land in the Marsh, which are known by the name of Mean Lands, and are demised by them to Sir John Edward Honeywood by lease, dated 30th June, 1842, for twenty-one years, renewable in the usual manner, at the yearly rent of 10*l.* 10*s.* A modus of 1*s.* per acre has been immemorially paid to \*the vicar for the tithes of these lands, and no other tithe or payment in lieu of tithe, whatsoever. [\*141]

After confirmation of the award, a valuer was appointed, (a) who made an apportionment of the rent-charge among the lands in the parish, and therein charged part of the immemorial pasture lands, including those demised to Sir J. E. Honeywood, not only with the amount of the moduses, but with the further sum of 1*s.* per acre to be paid to the impropriate rector or his lessees as part of the gross rent-charge of 210*l.* awarded in lieu of the tithes of corn and grain.

Sir J. E. Honeywood and other land-owners, objecting to the apportionment, were heard before Mr. Woolley and another Assistant Tithe Commissioner, (b) at meetings called for the purpose, and contended that the valuer had no power to charge the pasture lands with any sum beyond the amount of the moduses. The valuer stated that he had pursued the directions of the Tithe Commutation Act, (c) "and apportioned, in the

(a) The valuer stated on affidavit that no principles were agreed upon for his guidance under stat. 6 & 7 W. 4, c. 71, s. 33.

(b) The apportionment, being found imperfect in some particulars, (not material to the decision in this case,) was sent back for revision; and the objections were renewed on subsequent hearings.

(c) Stat. 6 & 7 W. 4, c. 71, enacts:

Sect. 33: "That as soon as may be after the choosing of such valuer or valuers," (s. 32) "and after the confirmation of the said agreement, the valuer or valuers so chosen shall apportion the total sum agreed to be paid by way of rent-charge instead of tithes, and the expenses of the apportionment, amongst the several lands in the said parish, according to such principles of apportionment as shall be agreed upon at the meeting at which the valuer or valuers shall be chosen, or if no principles shall be then agreed upon for the guidance of the valuer or valuers, then, having regard to the average titheable produce and productive quality of the lands, according to his or their discretion and judgment, but subject in each case to the provisions hereinafter contained, and so that in each case the several lands shall have the full benefit of every modus and composition real, prescriptive and customary payment, and of every exemption from or non-liability to tithes relating to the said lands respectively, and having regard to the several tithes to which the said lands are severally liable; provided that it shall be lawful for the said valuers, when an even number is chosen, by any writing under their hands, to appoint an umpire before they proceed upon the business of such apportionment, and the decision of the umpire on the questions in difference between the valuers shall be binding on them, and shall be adopted by them in the apportionment."

\*142] cases objected to, according to "the average produce and productive quality of the lands; and, where it seemed to him that the  
 \*143] productive quality admitted of its being arable, and there "was a reasonable probability of the grass being so converted into arable, he had fixed, in respect of such probability, a small portion of the rectorial rent-charge on such lands accordingly." Evidence was adduced on the part of Sir J. E. Honeywood to shew that the pasture land in the Marsh was not likely to be converted into arable, and that breaking it up for that purpose would not be advantageous: but the owners of arable land, who were satisfied with the apportionment, produced evidence to a contrary effect. The Assistant Tithe Commissioners overruled the objections, being of opinion that the apportionment was made on just principles; and Mr. Woolley reported to the Tithe Commissioners accordingly: but, on the request of the objectors, the parties were finally heard (May 24th, 1844) at Somerset House, before the Tithe Commissioners themselves, who (referring to the evidence taken by the Assistant Commissioners) gave their decision in favour of the apportionment.

Both the apportionment and the judgment of the Commissioners proceeded on the opinion that, after the commutation of tithes in Appledore had been completed, and in consequence of it, the pasture lands held by Sir J. E. Honeywood of the dean and chapter, or some part thereof, would be converted into arable; and therefore it was reasonable to relieve all or  
 \*144] some of the lands now arable from a portion of the sum "awarded to the impropriate rector and his lessees for corn and grain tithe, and charge it upon the lands then in pasture. The objectors protested

Sect. 36 enacts: "That after the 1st day of October, 1838, the Commissioners shall proceed in manner hereinafter mentioned, at such time and in such order as to them shall seem fit, either by themselves or by some Assistant Commissioner, to ascertain and award the total sum to be paid by way of rent-charge instead of the tithes of every parish in England and Wales in which no such agreement binding upon the whole parish as aforesaid shall have been made and confirmed as aforesaid." (sects. 18, 21, 27.)

Sect. 37 enacts: "That in every case in which the Commissioners shall intend making such award," notice shall be given, &c.; and, after twenty-one days from such notice, "the Commissioners or some Assistant Commissioner shall, except in the cases for which provision is hereinafter made, proceed to ascertain the clear average value (after making all just deductions on account of the expenses of collecting, preparing for sale, and marketing, where such tithes have been taken in kind,) of the tithes of the said parish, according to the average of seven years preceding Christmas in the year 1835: Provided that if during the said period of seven years, or any part thereof, the said tithes or any part thereof shall have been compounded for or demised to the owner or occupier of any of the said lands in consideration of any rent or payment instead of tithes, the amount of such composition or rent or sum agreed to be paid instead of tithes shall be taken as the clear value of the tithes included in such composition, demise, or agreement during the time for which the same shall have been made; and the Commissioners or Assistant Commissioner shall award the average annual value of the said seven years so ascertained as the sum to be taken for calculating the rent-charge to be paid as a permanent commutation of the said tithes.

Sect. 44 enacts: "That if any modus or composition real, or prescriptive or customary payment, shall be payable instead of the tithes of any of the lands or produce thereof in the said parish, the Commissioners or Assistant Commissioner shall in such case estimate the amount of such modus, composition, or payment as the value of the tithes payable in respect of such lands or produce respectively, and shall add the amount thereof to the value of the other tithes of the parish ascertained as aforesaid, and shall also make due allowance for all exemptions from or non-liability to tithes of any lands or any part of the produce of such lands."

against this principle, as one which could not legally be acted upon: but, when the contrary was decided, they adduced evidence before the Assistant Commissioners to show that the woodlands might probably be converted to arable; no charge, however, was laid on these.

It was stated on affidavit in support of the rule that the meadow-lands in the parish were not likely to be turned into arable, especially those held under the dean and chapter; because the lands would be deteriorated thereby; because the dean and chapter might be deemed guilty of waste in breaking up ancient pasture and converting it, or permitting it to be converted into arable: and because Sir J. E. Honeywood was prohibited by his lease, under a penalty of 50*l.* per acre, from converting any part of the demised lands into tillage without license in writing first had from the lessors: and Sir J. E. Honeywood himself deposed that he neither had applied nor meant to apply for license to break up any of these lands for tillage; and that, although a large owner of lands in Romney Marsh, he never had converted any part of them into arable.

Affidavits in opposition to the rule were sworn by Mr. Woolley, the Assistant Tithe Commissioner who made the award, and by the valuer. They stated that there was no part of any parish in Romney Marsh where there was not pasture which might profitably become arable, and arable which might return into pasture: that the lands of Sir J. E. Honeywood were of a character and quality, and in a situation, which well adapted them for being ploughed; that other contiguous lands of like \*character and quality had become arable; that lands of the dean and chapter to a great extent, within the Marsh, had been ploughed up within living memory; and that, for reasons which were particularly stated, (especially on account of the value of underwood in a country of hop plantations,) there was no appreciable probability of the woodland being grubbed up for tillage. Mr. Woolley also deposed that, in apportioning rent-charges, the practice hitherto has been to consider the state of the lands, not only during the years of average mentioned in stat. 6 & 7 W. 4, c. 71, s. 37, and at the time of apportionment, but the probable course of their cultivation, as grass or arable, for the future. [\*145]

The Assistant Commissioners, in Mr. Woolley's report, stated that they had received a great mass of contradictory evidence; but that, on the leading facts and the opinions given by men of character and experience, they could arrive at no other conclusion than that the appeal was unfounded. And they observed: "It would not be possible to say that any particular part of the land now under charge will be ploughed, or the amount must necessarily be much more than it is: but the lands are proved to be of a character and in a situation where a considerable quantity of land is ploughed: that there is nothing in the particular circumstances of the case to take them out of the ordinary rule of probability: and that therefore it is most reasonable to charge a small sum on all the



lands of the class, which will in truth be a moderate charge on less than 4 per cent. of the lands over which it extends.”

Annexed, as an exhibit to the affidavit of Mr. Woolley, was the judgment of the Tithe Commissioners, which concluded thus: “Taking the whole case, \*therefore, into consideration, we shall confirm the ap-  
 \*146] portionment if we are not forbidden to do so by a superior court.”(a)

(a) The entire document was as follows:—

“In the case of Appledore, we have three parties complaining of the apportionment, on three grounds; though not all three parties on the same grounds.—One party complains that the apportioner has not given the full benefit of a modus to the owners of grounds of which that modus protects all the produce, except corn and grain. This is a parochial modus, and would in the same manner protect the lands actually arable, if they grew other produce than corn and grain. In cases where it is clearly improbable that the grass lands will ever be ploughed up, we think the amount of the modus only ought to be apportioned on them; but in this case we are of opinion that the apportioner, in the execution of his duty of allowing the full benefit of this modus to all the parties entitled to it, was justified in laying a small sum in addition to the modus on lands actually in grass; and that the owners of the lands now in grass get their full share of the benefit of this modus when they are protected from ever paying more than the modus, with a very slight addition, whatever may be the future produce of their soil.—The second party complains that his lands can never be ploughed up, or produce corn and grain, and therefore ought not to be charged, permanently, with any thing more than the modus it is protected by when in grass. He states that his land can never be ploughed up; 1st, because he holds under a lease from the Dean and chapter of Canterbury, which makes it penal in him to plough without their license; and 2dly, because such license can never legally be given, since that supposes the Dean and chapter to be parties to waste. We assume waste to be the doing some act which is prejudicial to the inheritance. On the evidence before us we believe that there are qualities of land in Appledore, the ploughing up a portion of which would add to the permanent value of the estate; and we are not disposed to consider such an operation necessarily waste. It would be waste perhaps in the tenant to plough up without license; but, when he ploughs up with the deliberate license of the lessor, it ceases, it appears to us, under such circumstances to be waste. It is contended that the Dean and chapter have no right to grant such license. It has not been made clear to us that a license granted under circumstances, in which the inheritance would be benefited, and not injured, is an illegal license when granted by a Dean and chapter. And, as the law is not clear as to its being illegal, a long and, as far as it appears to us, unquestioned practice can be adduced in favour of its legality. It is not disputed that the tenants of the Dean and chapter have been in the habit of ploughing under license from their lessors. We decide, therefore, that, if an addition to the modus was proper on other grounds, it was not improper simply because the lands were held under the Dean and chapter of Canterbury by a lease which made it penal to plough without their license.—Sir John Honeywood, a third party, complains that, supposing the preceding questions disposed of, still no addition to the modus ought to be apportioned on his lands, because, from their quality and position, it is grossly improbable that they will ever be ploughed, or, had the tithe act not passed, would ever have produced any titheable produce not covered by the modus. On this point a great body of evidence was produced before the Assistant Commissioners, of which their minutes are now before us. It consists of testimony as to opinion, and testimony as to facts. The testimony as to opinion appears to us pretty equally balanced: witnesses, many of them well known to us as men of skill and high character, have deposed, some that they believe it grossly improbable that any part of Romney Marsh will ever be ploughed up, others that they consider it highly probable that a portion of it, of a peculiar quality and description, will be ploughed up. If we put aside, however, these conflicting opinions, and look only to the testimony as to facts, it appears to us to be clearly established that there is a portion of Romney Marsh, not a very large one perhaps, which it is found desirable and profitable to plough up; that there is a tendency to plough distinctly established, now; and that that tendency becomes greater whenever the tithe commutation is finally settled, and the fear of tithe in kind got rid of. It further appears to us that that portion of Sir John Honeywood's estate to which the apportioner has assigned a rent-charge in addition to the modus, is, for its quality and position, to be ranked among the lands which there is a tendency in the Marsh to plough. The addition made to the modus might be in excess; but we were not called on to



\*In last Hilary and Trinity terms, (a) cause was shown by Sir F. Thesiger, Solicitor-General, and Buller (b) for the Tithe Commissioners, and Hugh Hill for the land \*owners, who were satisfied with their judgment. First, no prohibition lies. Where it has been intended by stat. 6 & 7 W. 4, c. 71, to give an appeal, particular modes are pointed out, and parties are restricted to those. Sect. 95(c) takes away certiorari; and sect. 45(c) directs, in case of dispute, a hearing before the Commissioners or Assistant Commissioner, whose decision is to be final, except where, under sect. 46, a feigned issue may be directed by them, the payment in question exceeding 20*l*. Here, then, the course directed by the statute has been followed, and a conclusive decision pronounced. Confirming the apportionment, which alone remains to be done, is an act merely ministerial, under sect. 63, which directs that, after the objections to the apportionment have been disposed of, the instrument of apportionment shall be engrossed, signed, and sent to the office of the Commissioners, "and if the Commissioners shall approve the apportionment they shall confirm the instrument of apportionment under their hands and seal, and shall add thereunto the date of such confirmation." It is true that, by sect. 65, the Commissioners, if they shall see fit, "before confirming any agreement, award, or apportionment, may require notice thereof to be given in such manner as they shall direct to the person next in remainder," &c., "or any other person to whom they may think notice ought to be given, and may by themselves or by some Assistant Commissioner hear and determine any objection made to such confirmation by any person interested therein, and may direct any award or apportionment to be amended accordingly." \*But here they have already afforded every necessary opportunity for objecting, and have decided upon the objections. They have exercised a discretionary power given them by statute: it is not shown that they have exceeded their jurisdiction or transgressed the general law: and the court would not presume that they were about to do so, supposing that, in such case, a prohibition would lie: therefore, according to the principles recognised in *Ex parte Smyth*, 3 A. & E. 719; *Hallack v. The University of Cambridge*, 1 Q. B. 593; *Hall v. Maule*, 7 A. & E. 721; and *Griffin v. Ellis*, 11 A. & E. 743, (d) no ground is laid for this application. In

examine that: it was admitted that, if any addition at all was to be made to the modus, the addition actually made was not unreasonable in amount. Taking the whole case, therefore, into consideration, we shall confirm the apportionment, if we are not forbidden to do so by a superior court."

(a) January 30th, 1845: before Lord Denman, C. J., Patteson, Coleridge, and Wightman, Js. June 9th, 1845; before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

(b) Sir F. Thesiger stated that the Commissioners did not wish to dispute that a prohibition lay: and he did not argue this point. The court, however, desired to hear the arguments of the other counsel for and against a prohibition before entering farther into the case: and the discussion, on the first day of the argument, was confined to this question.

(c) *Antè*, p. 32, note (b).

(d) Hill also cited *Regina v. Higgins*, decided in this court, November 23d, 1843; where a rule nisi was obtained for a prohibition to prevent certain justices of Herefordshire from proceeding on a conviction at petty sessions, (May 5th, 1843,) whereby William Higgins was

\*150]    \*the late case, *Re Ystradgunlais Commutation*, antè, p. 32, 39, the court would not inquire whether or not a prohibition lay, but looked upon the point as conceded. There, however, the Commissioners, if they had proceeded, must, according to the view taken by the court, (a) have committed an excess of jurisdiction by deciding a question of boundary, which the Commutation Acts withdrew from their cognisance. [COLERIDGE, J. Suppose they had merely disregarded some exemption. Would that have been an excess of jurisdiction, or only a misjudgment?] If the question were merely whether or not they had exercised a sound discretion, as in *Rex v. The Poor Law Commissioners, In re Newport Union*, (b) the court would not interfere.

Secondly, there is no ground for a prohibition, because the Commissioners have decided rightly. Stat. 6 & 7 W. 4, c. 71, s. 33, antè, p. 141, note (c), which treats of apportioning the rent-charge, requires the valuers to apportion "having regard to the average titheable produce," and also to the "productive quality" of the lands: the language is not the same

\*151]    as in sect. 37, antè, p. 142, note (c), where, for the \*purpose of ascertaining the rent-charge, the Commissioners are directed "to ascertain the clear average value" "of the tithes," "according to the average of seven years preceding Christmas in the year 1835." The purpose in the latter case is to effect a general change of contingent into absolute rights, accomplishing an object beneficial on the whole, though necessarily with roughness in the detail. But, in the former case, the apportionment among individual land-owners admits of exact inquiry, and of adjustment by the circumstances of each case; not only by the tithe which particular land has hitherto yielded, but by that which it is

convicted of angling in a part of the river Wye in which Elizabeth Blissett had a private right of fishery, contrary to stat. 7 & 8 G. 4, c. 29, s. 34. It appeared that at the petty sessions, where the conviction took place, the attorney for Higgins stated, as a preliminary objection, that he bonâ fide claimed a right of fishery over the place in question. The justices overruled the objection. Verbal evidence, but no regular documentary proof, was then given of Mrs. Blissett's title; and Higgins requested an adjournment in order that he might produce evidence in support of his own right. The justices, being of opinion that he had already had sufficient time for the purpose, refused an adjournment, and convicted him in the penalty of 1*l.* 10*s.*, and 10*s.* costs. Kelly showed cause, but was stopped by the court. Sir G. A. Lewis, who supported the rule, urged that no appeal lay under sect. 72; sect. 73 took away certiorari; and a criminal information would afford no relief to the party; therefore there was no remedy but prohibition. He cited *Regina v. Burnaby*, 2 *Ld. Ray.* 900; where a person was summarily convicted under stat. 43 Eliz. c. 7, s. 1, of cutting down trees, and HOLT, C. J., is reported to have said that, while the conviction was unremoved, a prohibition might go if the justices had acted without jurisdiction; and that "without doubt, if the defendant had but a colour of title, the justices of peace had no jurisdiction in the cause." [Lord DENMAN, C. J. No one else said it; and I doubt if HOLT did.] The justices cannot try a question of right of fishery. [COLERIDGE, J. By the statute they must consider the complainant's right.] They cannot decide whether he has the exclusive right or not. This application is consistent with the rule laid down in *Regina v. Bolton*, 1 *Q. B.* 66. If the justices had jurisdiction, they were bound to try according to law. *Per Curiam*, (Lord DENMAN, C. J., WILLIAMS, COLERIDGE, and WIGHTMAN, Js.) The only question is whether the justices had jurisdiction; and it is clear they had. If they had refused to hear legal evidence, or decided improperly upon the evidence, that would be misconduct, but it would be different from acting illegally and without jurisdiction. To entertain applications like this would get rid of clauses taking away certiorari in all statutes.

Rule discharged.

(a) See *Re Dent Commutation*, antè, p. 43.

(b) 6 A. & E. 54.

likely to yield hereafter. The Commissioners have admitted the consideration that, if the pasture land is turned into arable, it will become liable to tithe in kind. The objectors would exclude that consideration, because the land, as pasture, is covered by a modus. Their argument would change a modus for certain produce already raised into a modus for whatever might be raised in future. If the view, on the other side were correct, much of the machinery of this act would be unnecessary; it would be enough to add to the award that all persons should contribute in the same ratio in which the apportioner should find that each had already been liable to tithe. If it is objected that, under the regulation proposed, any close belonging to Sir J. E. Honeywood which is not broken up in a future year loses the benefit of the modus though it continue in pasture, the answer is, that the contemplated system applies, not to his lands only, but to all those in the parish. Any land not tilled in a future year, whether it has been pasture or not, will lose the benefit of the modus; but the general effect (calculated as it has been with reference to probability) must be considered; and the contingent loss to individuals must be balanced by the general loss that might accrue [\*152 if land which may hereafter be broken up for tillage were not now taken into apportionment. The objection, if made, that the woodland has not been included, is met by the affidavits, and, at all events, applies only to the detail, not the principle, of the apportionment.

It has been contended that the pasture land held by Sir J. E. Honeywood cannot be treated as convertible into corn land, because such an alteration would be contrary to the terms of his lease. But the lease prohibits only his ploughing the land without license from the lessors. It has been urged that the Dean and chapter would be guilty of waste in granting such license; and Co. Litt. 53 b, may be cited, as laying down that conversion of meadow land into arable is waste. The proposition, as a universal one, has been denied, even in the case of a private incumbent; *The Duke of St. Alban's v. Skipwith*, 8 Beav. 354; and it is doubtful, at least, where the change is made for the amelioration of the land.<sup>(a)</sup> But at all events it does not apply to an ecclesiastical corporation aggregate. No person can impeach them of waste; nor would there be ground for it, if their act improved the land, though, perhaps, if they were committing actual spoil, the crown might obtain an injunction to prevent it. The statutes 32 H. 8, c. 28, and 13 Eliz. c. 10, restraining ecclesiastical persons as lessors, do not apply; nor is an ecclesiastical corporation aggregate within the statutes as to waste, \*Marlbridge, [\*153 (52 H. 3,) c. 23, Gloucester, (6 Ed. 1,) c. 5, Westm. 2, (1 stat. 13 Ed. 1,) c. 22. (*Wortley*, contra, said, he should not argue that the land could not under any possible circumstances be broken up, but should contend that the chance was one which the valuer could not take into

(a) See *Simmons v. Norton*, 7 Bing. 640; *Doe dem. Grubb v. The Earl of Burlington*, 5 B. & Ad. 507.

account, and that he ought to consider only the status quo. *H. Hill* referred to *The Dean and Chapter of Worcester's Case*, 6 Rep. 37 a; *Liford's Case*, 11 Rep. 46 b, and *Jefferson v. Bishop of Durham*, 1 B. & P. 105. The point was not further argued.) [PATTESON, J. If they can, under any circumstances, give the consent, I do not see that we can enter into the probability of their doing or not doing it.]

*Wortley, Deedes and Peacock*, contra. First, a prohibition lies. The Commissioners would exceed their jurisdiction if they confirmed the apportionment: and the act remaining to be done is not merely ministerial; for, by stat. 6 & 7 W. 4, c. 71, s. 63, they confirm the apportionment if they approve, and not otherwise; and here they have delayed confirming, expressly to give an opportunity of referring to this court. Even if they had pronounced what could be considered a final sentence, this court might prohibit, for the want of jurisdiction. But the determination of the Commissioners is conclusive, by sect. 45, only where the controversy depending hinders the making of an award; *Girdlestone v. Stanley*, 3 Y. & C. 421. In that clause the decision is expressly made final; but in sects. 61 and 63, which enable the Commissioners to hear and determine objections to the apportionment, and confirm it if approved \*154] of, there is no "such provision. "Finally disposed of," in sect. 63, is no bar to a prohibition. [Lord DENMAN, C. J. Certainly not.] The argument on the other side seems to assume that prohibition does not lie at all unless the Commissioners are exceeding their jurisdiction; but in *Home v. Earl Camden*, 1 H. Bl. 476, 515, it was laid down generally, as ground for a prohibition, "that it belongs to the courts of common law to control the proceeding of all other courts, if they transgress the limits assigned to them;" and that a prohibition lay in that case, if it appeared "that the plaintiff has a legal right founded on an act of parliament, and that the commissioners of prize are proceeding to deprive him of that right, or to obstruct him in the prosecution of it." The judgment, there, for the plaintiff in prohibition was reversed by the court of Queen's Bench,<sup>(a)</sup> and the House of Lords agreed in that reversal,<sup>(b)</sup> but without overruling the general proposition laid down by the court of Common Pleas. In *Gould v. Gapper*, 5 East, 345, this court considered the misconstruction of a statute by the Ecclesiastical Court in a case within its jurisdiction to be ground of prohibition: in *Burder v. Veley*, 12 A. & E. 233, 264, that decision was recognised as law by PATTESON, J., who had formerly doubted it: and in *Veley v. Burder*, 12 A. & E. 265, the doctrine of *Gould v. Gapper* was adopted by the court of Exchequer Chamber. TINDAL, C. J., there (p. 313) cited *Jeffrey's Case*, 5 Rep. 66 b, as showing that a prohibition will be granted "where the Ecclesias- \*155] tical court is proceeding to compel a \*person to contribute to the repair of a parish church as an inhabitant, whose land in the

(a) *Lord Camden v. Home*, 4 T. R. 382.

(b) *Home v. Earl Camden*, 2 H. Bl. 533, 555, 536.

parish is on lease.” [COLERIDGE, J. It is laid down in *Home v. Earl Camden*, 2 H. Bl. 538, that prohibition is not maintainable unless the party complaining insisted upon the alleged misconstruction of the law when the case was before the inferior court, and stated the ground on which he afterwards relies in prohibition. Does that appear to have been done here?] The affidavits show that it was. Among other authorities which favour the enlarged view, now contended for, of the power to prohibit, are *Slawney’s Case*, Hob. 83, (5th ed.); *Tooker v. Loane*, Hob. 191; *Carter v. Crawley*, Sir T. Ray. 496; Com. Dig. *Prohibition*, (F. 13); 6 Bac. Abr. 584, tit. *Prohibition*, (I.) 7th ed.; (a) *Breedon v. Gill*, 5 Mod. 272, S. C. 1 Ld. Ray. 219; *In the Matter of the Chancellor, &c. of Oxford and Taylor*, 1 Q. B. 952, 971. These authorities apply here, if stat. 6 & 7 W. 4, c. 71, does not authorize the Commissioner to lay the additional charge upon the grass lands. It cannot be answered that the error in the apportionment is matter for appeal. Sects. 61 and 63 of stats. 6 & 7 W. 4, c. 71, are not appeal clauses. [PATTESON, J. The words of sect. 63, “and if the Commissioners shall approve the apportionment they shall confirm the instrument,” have that appearance.] Lord ELLENBOROUGH, in *Gould v. Gapper*, 5 East, 364, &c., points out many instances where that which might be deemed the subject of appeal is ground of prohibition.

Secondly, the Commissioners have not decided rightly. \*The [\*156 principle of the statute is to recognise present possessions, and take things as they exist. The construction attempted makes the holders of pasture land liable to a second tithe owner, the impropriate rector, whom they have not hitherto paid; and (as the argument on the other side has shown) it requires the valuer to solve questions of great difficulty as to the possibility of change in the culture of lands. And that change is contemplated, not in ordinary grass lands, but in ancient pastures, immemorially exempted from tithe. Sect. 33 expressly requires the apportionment to be made “so that in each case the several lands shall have the full benefit of every modus.” On the principle now contended for, the pasture lands would not have that benefit. It was foreseen that lands might be improved: but the legislature clearly thought it best to settle the commutation finally. This is proved by an exception in sect. 42, where a detailed provision is made for the charge on hop grounds and market gardens which cease to be cultivated as such after the commutation, and of grounds which, after that time, begin to be so cultivated. The inference is, that lands for which no such regulation is provided were considered, for the purposes of the act, as unchangeable in their culture. It is uncertain, not only whether the change will take place at all, but when, if made, it may begin: and, supposing it to be made

(a) The passage cited was: “If the commissioners for determining policies of insurance grasp at more power, or proceed otherwise than as they are enabled by the acts of parliament which create their jurisdiction, they will be prohibited by the king’s superior courts.”



hereafter, it is hard that parties should be subjected to a payment commencing now for alterations which may commence, if at all, at various and remote periods. If the greater or less probability of change is immaterial, the woodlands ought not to be exempt. The only reasonable view is, that both they and the pasture should be charged according to their \*present state. The words in sect. 33, “having regard to \*157] the average titheable produce and productive quality,” mean that a land-owner shall not benefit in his assessment, if, by bad cultivation, the actual titheable produce is less than might be expected from the productive quality, according to the average titheable produce of such lands in the parish. “Having regard to the several tithes to which the said lands are severally liable” means the tithes to which they already have been considered liable as due to the rector; it was not contemplated that the rector should have a rent-charge in consideration of a liability which had never been in force. Suppose all the land hitherto in corn had been covered by a modus, must the grass land be assessed for future corn crops on the principle of tithe in kind, leaving the actual corn crops to be assessed (as must be done by sect. 44) to the extent of the modus only? The construction relied upon by the objectors, while it excludes the hardships pointed out, does no injury to the owners of arable land, who will be assessed only in proportion to what they have paid before, and have no right to derive aid from a probability too vague to be estimated:

*Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation, (December 11th,) delivered the judgment of the Court. (a) We are of opinion that, in this case, a prohibition does not lie. The commissioners had power to go into the inquiry, and have not misconstrued the act. We think that what they have done is right. There are difficulties: but the possibility of the land reverting \*158] to a different \*state of culture must be taken into account in the apportionment; and the commissioners must make the best average they can. That course they have taken. Rule discharged.

(a) His lordship stated that the court had prepared a written judgment, which had been mislaid, but would probably be recovered. The MS. has not hitherto been found.

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**DOE, on the demise of JACOBS, against MARY PHILLIPS and Others.**  
*Friday, December 5th.*

A deed more than thirty years old, creating a term to attend the inheritance, was produced from the custody of the plaintiff's attorney. Plaintiff was administrator to the trustee of the term. There was evidence that the attorney had acted for the family of the defendants, who were beneficially interested in the premises to which the deed related, and it was not shown for whom the attorney held the deeds.

*Held*, that there was sufficient *prima facie* evidence of proper custody.

**EJECTMENT for lands in Kent.**

On the trial, before PARKE, B., at the Maidstone Summer assizes, 1844,



Ebsworth, clerk to Mr. Mourilyan the attorney for Jacobs, the lessor of the plaintiff, was called, and produced limited letters of administration granted to Jacobs, whereby he became entitled to a term of 500 years which had been vested in George Holyland, deceased. Ebsworth was then asked to produce a deed bearing date 7th October, 1767, by which this term was said to have been created. The defendant's counsel objected that it was not shown to come from a proper custody: upon which Ebsworth was further examined, and said: "I produce this deed from Mourilyan's office. He is concerned for the family of the Branns.<sup>(a)</sup> I took it out of the strong room at \*Mourilyan's. I found several [\*159 deeds now produced, all got from Mr. Mourilyan. There were two or three expired leases and a probate of the will of Samuel Hubbard. I don't know of his being employed for the two infant children of Brann, only by correspondence and papers in the cause. I have not conducted that correspondence myself." PARKE, B., considering that there was no sufficient evidence of proper custody, refused to allow the deed to be read: and the plaintiff was nonsuited.

*Wordsworth* in the next term obtained a rule for a new trial.

*Ogle* now showed cause. There was no proof how the deed came into Mourilyan's custody. [Lord. DENMAN, C. J. He was attorney to the lessor of the plaintiff.] It was not shown that he held the deeds for Jacobs; and, according to Ebsworth's evidence, he was concerned for the family of the Branns, who were beneficially interested under the deed, and might naturally be expected to have the custody of it. Suppose Mourilyan to have held this deed, having a lien upon it for debts due to him from the defendants, ought he to be allowed to produce it for another party against them? At least Mourilyan should have appeared himself to explain his possession. It was argued at the trial that the lessor of the plaintiff represented the infant claimants who are said to be members of the Brann family; but the defendants, admitting that the claimants are children of John Brann, the younger, a son of John Brann, father of the defendants, deny that John Brann the younger was a son of their mother Elizabeth Brann. And \*Ebsworth had no sufficient knowledge [\*160 of Mourilyan's being employed for the infant claimants. An attorney is not at liberty to produce deeds for one client which belong to another. *Randolph v. Gordon*, 5 Price, 312, goes farther than the decision in this case.

(a) According to the statement of facts made by *Ogle* on showing cause, the deed produced was one by which the premises in question were conveyed to Samuel Hubbard, and a term of 500 years assigned to attend the inheritance, and vested in George Holyland. Hubbard died in 1795, having devised the premises to his niece, Elizabeth Trig, who entered in 1801, and while in possession married John Brann. Her children became entitled under Hubbard's will at her decease. She died in 1836. The defendants in this action were her children by John Brann. The ejectment was brought on behalf of the infant children of John Brann, junior, who was said to be the son of John and Elizabeth Brann; but the defendants denied that he was a son of Elizabeth. The lessor of the plaintiff had no beneficial interest in the term.

*Wordsworth*, contra, cited *Doe d. Wildgoose v. Pearce*, 2 M. & Rob. 240. [Lord DENMAN, C. J., mentioned *Bishop of Meath v. Marquis of Winchester*, 3 New Ca. 183, 200.] *Wordsworth* was then stopped by the court.

LORD DENMAN, C. J. It is not necessary to show the strictest legal custody : (a) and in this case there was quite sufficient *prima facie* evidence. Probably the learned judge was actuated in the course he took by seeing an unrighteous attempt made on the part of the plaintiff.

PATTESON, J. It would be most inconvenient, if, in cases where a deed is produced by the party's attorney, inquiries were to be made how and where he got it.

WILLIAMS, J., concurred.

COLERIDGE, J. Evidence of the custody from which a deed thirty years old comes is given, not as a ground for reading the instrument for or against a party, but only to afford the judge reasonable assurance of its authenticity.

Rule absolute.

(a) See *Doe dcm. Neale v. Samples*, 8 A. & E. 151; *Croughon v. Elake*, 12 M. & W. 205; *Regina v. Kenilworth*, 7 Q. B. 642.

# \*161] \*The QUEEN against SEWELL.(b) Friday, December 5th.

Proceedings of magistrates for restitution of premises, under sect. 16 of stat. 11 G. 2, c. 19, are, by sect. 17, to be revised (in England) by the judges, on circuit, &c., acting as individual justices.

*Held*, therefore, that the allegation in an indictment, that an order was made by A. and B., the justices of assize for Surrey, was not supported by a certificate of such an order signed by the deputy clerk of assize in the same way as an order of court.

*Seemle*, that it is not necessary, on such indictment, to prove the proceedings before the magistrates, preliminary to the restitution; and that it is sufficient to put in the record made up by them, in which, after reciting the complaint and other proceedings, they declare that they put the complainant into possession.

*Seemle*, that orders under s. 17, of stat. 11 G. 2, c. 19, should be signed by the judges who make them.

INDICTMENT for disobedience to an order of restitution under stat. 11 G. 2, c. 19, ss. 16, 17.

The first count was in substance as follows.

That William Sewell appeared before James Traill, Esq., and Henry Weston, Esq., two of the justices of the county of Surrey, and complained upon his oath that he did demise at rack-rent unto Henry Wilson, of, &c., a messuage, &c., called, &c., situate in the parish of St. Saviour's, in the county of Surrey; and that on the 29th of September, &c., there was in arrear, &c., (averments that half a year's rent was in arrear, the premises deserted, and no sufficient distress to be had.) That the said W. Sewell did then request the said justices to go and view the said messuage, &c., and to proceed therein according to the form of the statute in that case, &c. That the said justices did thereupon afterwards, in pursuance of the said request, and in consequence of the said complaint, go,

(b) See *Regina v. Traill*, 12 A. & E. 761.

&c., (averment of proceedings by the justices according to s. 16 of the statute, on a first and second view, and that, upon the said view, Wilson did not nor did any person on his behalf appear and pay, &c., and there was not sufficient distress to be had upon the premises, &c.;) and thereupon the said justices put the said W. Sewell into possession of the said premises according to the form of the statute in such case, &c.; and that the said W. Sewell had thenceforth kept possession thereof. That afterwards, to wit, on, &c., the justices caused the proceedings \*to be recorded: (here the record was set out, stating the complaint on oath, its subject matter, view by the magistrates, notice affixed on the premises, &c., second view, default by tenant, &c., and possession given to the complainant, October 18th, 1839.) That neither of the said justices had any interest in the premises. That afterwards, to wit, &c., at the assizes(a) held at Kingston upon Thames in and for the said county of Surrey, before the Right Honourable JAMES Lord ABINGER, Chief Baron, &c., the Honourable Sir JOSEPH LITLEDALE, Knight, one, &c., and others their fellows, justices of our said lady the queen, appointed to take the assizes for the said county of Surrey according to the form of the statute in that case, &c., the same then and there being the next assizes held in and for the said county of Surrey, after the putting of the said W. Sewell into possession of the said premises as aforesaid, the said Henry Wilson did make appeal, and apply to the said Right Hon. J. Lord A. and Hon. Sir J. L. knight, then and there being such justices of assize for the said county of Surrey, which was the county in which the said messuage, &c., lay and were situate as aforesaid, and then and there required the said justices of assize, to wit the said J. Lord A. and Sir J. L., to examine in a summary way the said proceedings of the said H. Weston \*and J. Traill as such justices as aforesaid; and that afterwards, at the assizes aforesaid, to wit, on, &c., in the county aforesaid, the said justices of assize did hear the said appeal, and then and there examine in a summary way the said proceedings of the said H. Weston and J. Traill as such justices as aforesaid, and did then and there duly consider the same, and did then and there, in exercise of the powers conferred upon the said last-mentioned justices of assize by the statute in such case, &c., by their certain order then and there made, order restitution to be made of the said premises, to wit, the said messuage, &c., to the said H. Wilson, together with his expenses and costs, amounting, &c., to be paid

(a) Stat. 11 G. 2, c. 19, s. 17, provides: "That such proceedings of the said justices shall be examinable in a summary way by the next justice or justices of assize of the respective counties, in which such lands or premises lie; and if they lie in the city of London or county of Middlesex, by the judges of the Courts of King's Bench or Common Pleas; and if in the counties palatine of Chester, Lancaster, or Durham, then before the judges thereof; and if in Wales, then before the courts of grand sessions respectively; who are hereby respectively empowered to order restitution to be made to such tenant, together with his or her expenses and costs, to be paid by the lessor or landlord, lessors or landlords, if they shall see cause for the same; and in case they shall affirm the act of the said justices, to award costs not exceeding 5*l.* for the frivolous appeal.

to the said H. Wilson by the said William Sewell. That the said W. Sewell appeared before the said justices of assize on the hearing of the said appeal: and that the said last-mentioned order was afterwards, to wit, &c., duly and personally served upon the said W. Sewell; and that the said W. Sewell then and there had notice and knowledge thereof, and was then and there requested and required, &c., (to restore possession according to the last-mentioned order;) and the said W. Sewell then and there had notice of the several matters hereinbefore mentioned. Averments, that a reasonable time for restitution had elapsed; that Wilson had always been ready and willing to accept and receive restitution, but that defendant neglected and refused, and had hitherto neglected, &c., to make restitution, &c., as by the last-mentioned order was directed, nor had he obeyed the said last-mentioned order, though often requested, &c.: but that he had, from the time of obtaining possession as aforesaid, hitherto kept and retained the same, in contempt of the said last-mentioned justices of assize and of the said last-mentioned order, and against the peace, &c.

\*164] \*The second count was in a similar form, but not setting out the record of proceedings before the justices of peace.

Plea. Not guilty.

On the trial, before PARKE, B., at the Guilford Summer assizes, 1844, after proof of the original proceedings before the magistrates by an examined copy, the following order (being that which the defendant was indicted for disobeying) was produced by a clerk of the crown office.

"Surrey, } At the assizes held at Kingston upon Thames," &c., "on,"  
to wit } &c. (23d March, 3 Vict.,) "before the Right Hon. JAMES Lord  
ABINGER, chief baron," &c., "the Hon. Sir JOSEPH LITTLEDALE, Knight,  
one of the justices," &c., "and others their fellows, justices of our said  
lady the queen appointed to take the assizes for the said county of Surrey,  
according to the form of the statute," &c. "Whereas at these present as-  
sises an appeal according to the form of the statute," &c., "was made to  
the above-named justices of assize on the part of one Henry Wilson, the  
tenant hereinafter mentioned, against the proceedings hereinafter set forth  
and stated to have been taken and recorded by James Traill and Henry  
Weston, Esquires, two of the justices," &c. "assigned to keep the peace,"  
&c., "the record of which said proceedings is in the words and figures  
following," &c. (setting it out:) "Now, the above-named justices of as-  
size, having heard the said appeal, and duly considered the same, do, in  
the exercise of the power conferred upon them by the statute," &c., "order  
restitution to be made of the said premises, in the hereinbefore recited  
record of proceedings mentioned and described, to the said H. Wilson,  
the tenant hereinbefore mentioned, together with his expenses and costs  
\*165] amounting to the sum of \*30*l.* 8*s.* 4*d.* to be paid to the said  
H. Wilson by the said William Sewell the landlord."

(Signed)

"R. MARSHALL STRAIGHT,  
"Deputy Clerk of Assize."

The witness had obtained this document from the crown office, where it was lodged on 15th June, 1840. Mr. Denman, the clerk of assize, being called, proved that Mr. Straight was his deputy, and that the document produced bore Mr. Straight's signature, and was stamped with the stamp of his office, which is put upon all orders of court and indictments. Mr. Denman added that there was in such cases no other document than this. The order was then received and read.

At the end of the case for the crown the defendant's counsel objected: 1. That proof should have been offered of the complaint by the defendant to the magistrates, to give jurisdiction. 2. That the order of restitution was not proved as alleged in the indictment; the allegation being that it was an order of Lord ABINGER, C. B., and LITTLEDALE, J., whereas the proof was of an order of the court. 3. That the order produced was not addressed to Sewell, and, therefore, not an order on him; and, if, as a general order, it was binding on the sheriff or on those in possession of the premises, still Sewell was not liable. 4. That, as the order of restitution was in the nature of a reversal, and the charge against the defendant was for *wilful* contempt of it, proof ought to have been given that it was in his power to restore possession. PARKE, B., considered that the second and third were good objections: and a verdict was taken for the defendant, his lordship reserving leave for the prosecutor to move to enter a verdict for the crown.

In the next term, *Shee*, Serjt., obtained a rule nisi accordingly.

\*Sir F. Thesiger, Attorney-General, (with whom were Dowling, Serjt., and Bramwell,) now showed cause. [\*166] 1. The prosecutor gave no proof of the preliminary proceedings; for the order does not prove its recitals. Nor would it do so even if it were a record. According to the argument which must be urged on the other side, the indictment would have been good if it had begun with the order of restitution; but that is clearly not so. The complaint ought to have been proved. [PATTERSON, J. The prosecutor gave in evidence a copy of the original proceedings before the magistrates.] That contains a recital only of the complaint. [PATTERSON, J. Suppose the magistrates had made the order without any complaint.] Here the indictment alleges a complaint, which ought to be proved. *Basten v. Carew*, 3 B. & C. 649, and *Ashcroft v. Bourne*, 3 B. & Ad. 684, which were cited on moving for the rule, show only how far magistrates and those who set them in motion are protected, where there is jurisdiction; they do not bear on this case. If this had been an indictment for disobeying the order of the magistrates, the recitals in that order would not have been evidence of facts against the defendant; *Rex v. Gilkes*, 8 B. & C. 439; indeed it is often necessary to prove more than need even be stated in a conviction; *Chaney v. Payne*, 1 Q. B. 712, 722. [PATTERSON, J. The material fact is that the two magistrates had made an order. The other statements are immaterial, and need not be proved.] 2. The order put in does not support the in-

dictment, which alleges the order of restitution to have been made by Lord ABINGER, C. B., and LITTLEDALE, J.; whereas the order, on the face of it, appears to be made by those two and "others their fellows," to whom it refers as "the *above named* justices." [COLERIDGE, J.

\*167] "The others their fellows are not *named*."] Stat. 11 G. 2, c. 19, s.

17, does not contemplate an act literally in court; for the justices of assize sit in separate courts. It was not necessary that the order should have been in writing. If in writing, it should have been signed by the judges themselves, who ought to have made it as individuals. That which is produced is an order of court on the face of it, and not what it is alleged to be in the indictment.

The 3d and 4th objections were not gone into. *Rex v. Trail*, 12 A. & E. 761, was cited: and the court called upon

*Shee*, Serjt., and *Bovill*, to answer the second objection. Appeal to the justices of assize is given by the statute. [Lord DENMAN, C. J. The statute uses the term justice of assize in its popular sense.] Even if that be so, still they are to act as justices of assize and not simply as judges; and, therefore, the signature of the clerk of assize is sufficient to authenticate acts which in that character they may perform. [PATTESON, J. Can you mention any thing not done by a court, in that character, which is so authenticated?]

Lord DENMAN, C. J. It is clear that the proof in this case was insufficient. The indictment is correct in form; for the meaning of the statute is that these orders of justices should be revised by persons going the circuit as judges, not by those merely named in the commission. The acts in question are not among those which the commission authorizes. Therefore I think that the judges should act as individuals under the provisions of the statute; and proof should be given that they \*168] did so \*act; and, as it was not intended that they should perform this duty as a court, the certificate of the clerk of assize is not applicable.

PATTESON, J. The seventeenth section of stat. 11 G. 2, c. 19, which makes the proceedings of the justices "examinable," "by the next justice or justices of assize of the respective counties," gives this power to judges of the courts; not to the persons in the commission as such, but to judges of the courts of Westminster who are travelling as justices of assize; the authority is given to them as individuals. The allegation in the indictment, then, is correct; but the proof offered is of an act of the court. I rather think that the order should have the signatures of the judges who make it: but it is not necessary to determine that point; for in this case there was no evidence that the order was made by Lord ABINGER and Mr. Justice LITTLEDALE. The signature of the deputy clerk of assize does not prove that it was done by those particular members of the commission.

WILLIAMS, J. The simple question is, whether the certificate of Mr.



Straight is proof of an order alleged to have been made by Lord ABINGER and Mr. Justice LITTLEDALE. If the order had been made judicially by virtue of their authority under the commission, perhaps it would have been correct: but there is nothing in the commission that has reference to such a power.

COLERIDGE, J. The question turns on sect. 17; and it is, whether this be a power given to the commissioners of assize or to individuals. I have no doubt that the latter is the true construction. Other parts of the same \*clause show it. If the lands lie in the city of London, or in Middlesex, the proceedings are to be examinable “by the judges of the court of King’s Bench or Common Pleas;” if in the counties palatine, “then before the judges thereof;” “if in Wales, then,” (changing the phrase) “before the courts of Grand Sessions respectively.” If, then, the judges act, not as the court sitting under the commission, but as individuals, there is no proper authentication of their act in this case. The clerk of assize clearly cannot give it: there must be some other way. Probably the signature of the judges themselves might be proper: but at all events the officer cannot, by his signature, authenticate the act of an individual justice. Rule discharged.

### WILLINGTON against BROWNE.

In an action for rent payable under an agreement with trustees of turnpike roads, demising tolls and toll-houses, the declaration need not show that the forms required by stat. 3 G. 4, c. 126, s. 55, were observed in the letting.

It is sufficient if the count states that, at a meeting of the trustees, held at, &c., the tolls, &c. were put up to be let by auction under certain conditions, &c., at which meeting A. B. was the last and highest bidder, and thereupon, by a memorandum of agreement, &c., it was witnessed, &c.; mutual promises, and entry of defendant.

In an action on such agreement, if the instrument be produced, stating that the trustees have contracted, &c. with the lessee, “witness the hands of C. and D., two of the trustees,” &c., and of the defendant, and the signatures of defendant and of C. and D. be proved, such instrument is evidence against the defendant that C. and D. were trustees, and will support a verdict against him in an action at their suit as trustees, though there be no other proof that they were so.

ASSUMPSIT. The plaintiff, clerk to the trustees under stat. 2 & 3 W. 4, c. li. (local and personal, public,) “for maintaining several roads leading to and from the town of Tamworth,” &c., declared on behalf of the trustees, against the defendant as one of the sureties for William Harrison under an agreement by which \*Harrison became renter of certain tolls, toll-houses and toll-gates, and which was alleged to have been signed by Edward Wingfield Dickenson and Edward Farmer, two of the trustees, and by Harrison and the defendant. Breach, non-payment of rent.

The declaration stated the letting to be as follows. “For that, whereas, after the making of the said act of parliament, to wit, on,” &c., “at a

meeting of the said trustees then held at the house of," &c., "in Tamworth," &c., "the tolls, to be collected by virtue of the said act, of the several turnpike gates then erected upon the said roads, and the toll-houses and toll-gates at which the same tolls were payable, were put up in order to be let to farm by auction for one year, to commence," &c., "in eight parcels or lots, and subject to certain conditions, being the same parcels or lots and conditions as were and are mentioned in the memorandum of agreement hereinafter mentioned: at which said meeting one William Harrison was the last and highest bidder for the third of the said parcels," &c., "described," &c.; and thereupon afterwards, and before the commencement of this suit, to wit, on," &c., "by a memorandum of agreement," "then made and signed by E. W. Dickenson and E. Farmer, then being two of the said trustees," and by Harrison and defendant, after certain recitals, "it was witnessed," &c., (the agreement was then set out:) "and thereupon, the said agreement being so made," &c., "in consideration," &c. (mutual promises, and entry of defendant.)

Plea, non assumpsit. Issue thereon.

On the trial, before POLLOCK, C. B., at the last Warwick assizes, the plaintiff put in the memorandum of agreement, to which the conditions  
 \*171] of sale were prefixed. "The memorandum began as follows.  
 "William Harrison, of," &c., "having become the highest or last bidder for lot 3," &c., "at the sum of," &c., "for the said term," &c., "and having produced," &c. (defendant and the Rev. Robert Watkin Lloyd,) "as his sureties, for the purpose before-mentioned, the trustees of the said turnpike roads, in pursuance of the power or authority given to or vested in them in and by the before-mentioned acts," &c., "and of all and every other powers," &c.; "have contracted and agreed, and do hereby contract and agree, with the said W. Harrison to let to him, and the said W. Harrison doth hereby agree to take, the said tolls and premises, &c., "for the said term," &c., "at and for the said rent," &c., "and under and subject to the conditions," &c. Promise and agreement by Harrison and the sureties "to and with the said trustees of the said turnpike roads," that Harrison, his executors, &c., shall pay the rent and perform the conditions. "Witness the hands of Edward Wingfield Dickenson and Edward Farmer, two of the trustees of the said turnpike roads, and of the said William Harrison and R. W. L. and R. C. B." (the sureties,) "the day and year, and at the place, first above written.

"E. W. DICKENSON.

WM. HARRISON.

"EDWD. FARMER.

R. C. BROWNE.

"R. W. LLOYD."

The signatures were proved: but there was no evidence, unless from the agreement itself, that Dickenson and Farmer were trustees. *Humfrey*, for the defendant, contended that the plaintiff must be nonsuited; and he

cited the dicta of TAUNTON and PATTESON, Js., in *Pearse v. Morrice*, 2 A. & E. 84. The Lord Chief Baron was of opinion that "the agreement, stating Dickenson and Farmer to be trustees, was evidence of that fact against the defendant who had signed the instrument so worded, but he reserved leave to move for a nonsuit. Verdict for plaintiff. [\*172]

*Humfrey*, in last term, (a) moved accordingly. Stat. 3 G. 4, c. 126, s. 57, requires the signature of the trustees or "two or more of them," or of their clerk or treasurer, to all agreements of this kind; and, the right of action here depending upon the statute, strict proof must be given that the requisite has been fulfilled. The objection suggested by TAUNTON and PATTESON, Js., in *Pearse v. Morrice*, 2 A. & E. 84, arises equally in this case; and Com. Dig. *Fait*, (E. 2), there cited, applies. [WIGHTMAN, J. In *Pearse v. Morrice* there was a deed in two parts; and the only part supposed to have been executed by the trustees was not produced. It was said there that the defendant was not concluded by his signature to the counterpart. Lord DENMAN, C. J. The question here is, whether the defendant's signature is not evidence against him that Dickenson and Farmer were trustees.] That which follows the "*in cujus rei testimonium*" is no part of the deed. [Lord DENMAN, C. J. Still it may be evidence. WIGHTMAN, J. If a party writes any thing on the deed, it may be evidence against him. Lord DENMAN, C. J. We will speak to my brother PATTESON on this; and, if he adheres to his doubt, we will grant a rule.] There is also an objection in arrest of judgment. Stat. 3 G. 4, c. 126, s. 55, "requires certain formalities when a meeting is held for letting tolls and gates: the declaration here does not state that those have been observed. [WIGHTMAN, J. What should it set forth? It should have stated that the observances were gone through; or should at least have said that the proceedings were "duly" taken. It ought in some manner to appear that the statutory power was followed. [\*173]

*Cur. adv. vult.*

Lord DENMAN, C. J., in the same term, (November 12,) delivered the judgment of the court.

We have ascertained from my brother PATTESON, that he thinks the Lord Chief Baron was clearly right in this case. And we are of opinion that a party executing an instrument in which persons are stated, as they are here, to be trustees, admits that they are trustees, and the instrument is receivable as evidence against him. Therefore there is no ground for a nonsuit. We think also, as to the motion in arrest of judgment, that it was not necessary to set forth the proceedings required by the act of parliament. Rule refused.

(a) November 5th. Before Lord Denman, C. J., Williams, Coleridge, and Wightman, J. By an oversight, this case was not inserted among those of the term.

**\*174] \*BRACEGIRDLE against PEACOCK and MAYNARD.**

Trespass for breaking and entering plaintiff's close, called, &c., and cutting down and prostrating 100 yards of his rails there standing. Plea, a public right of way over the close, and that defendants were using the said way, and because the said rails were wrongfully erected upon, and standing in and obstructing the said way, they prostrated the same, &c., which are the same supposed trespasses, &c. Replication, that the said rails were not standing in the said way, in manner, &c. Issue thereon.

The defendants had cut down some rails of the plaintiff standing on a public highway in the close described, and other rails belonging to him, which were in the same close and not on the highway.

*Held*, that the plaintiff could not recover: for, by taking issue on a plea which restricted the matter of dispute to the highway, he had excluded himself from proof as to rails in any other part of the close; and, to recover for these, he should have new assigned.

**TRESPASS.** The declaration stated that defendants, on, &c., and on divers other days, &c., broke and entered plaintiff's close, situate, &c., that is to say a certain wharf called Ballast wharf, and then and there cut down, prostrated, &c. the rails and palings of plaintiff then standing and being in the said close, viz. 100 yards of rails and 100 yards of paling, of great value, &c., and other wrongs, &c.

Pleas. 1. Not guilty. Issue thereon. 2. Omission by plaintiff to give notice of action according to a local act, (after mentioned,) and to stat. 5 & 6 Vict. c. 97, s. 4. (Nothing material turned on this plea.)

3. Right of way into, through, over and along the said close, in which, &c., for all the liege subjects, &c., on foot: that defendants were liege subjects, &c., and having occasion to use, and using, the said way over, &c., at the times when, &c., as they lawfully, &c.: "and, because the said rails and palings in the said declaration mentioned, before the said several times when, &c., had been wrongfully erected, and were then standing, in and across the said highway and obstructing the same, so that, without cutting down, prostrating and a little destroying the said rails and palings respectively, the defendants could not then pass," &c. "through, over, and along the said close in which, &c., in the said high-

**\*175]** way there as they ought \*to have done, the defendants, at the said several times when, &c., in order to remove the said obstructions, cut down, prostrated, and a little destroyed the said rails and palings in the said declaration mentioned, doing no unnecessary damage," &c.; "which are the same supposed trespasses whereof the plaintiff hath above complained." &c. Verification.

4. Right of way as in plea 3: that the locus in quo and the way were within the parish of Greenwich, Kent, within and under the provisions of stat. 4 G. 4, c. lxx., local and personal, public, "for lighting and watching the parish and town of Greenwich," &c.; that the said rails and palings, on, &c., until and at the said several times when, &c., were, in the judgment of the churchwardens and overseers, &c., of that parish, an obstruction to passengers using and passing along the said way, by

being placed upon such way ; that the churchwardens, &c., gave plaintiff, then being the occupier of the said close in which, &c., and to whom the said rails and palings then belonged, notice, pursuant to the statute, to remove the rail, &c., but he neglected to do so ; wherefore defendants, as the servants of the churchwardens, &c., and by their command, at the times, &c., in pursuance of the statute, took down and removed the said rails and palings, &c., (justification of the other trespasses in the usual form ;) doing no unnecessary damage, &c. : which are the same, &c. Verification.

Replication to plea 3. “That the defendants, at the said several times when, &c., were not using, passing or repassing, nor did they go, pass, or repass, in, by or along, the said highway ; nor were the said rails and palings then standing in or across the said highway, \*in manner [\*176 and form, &c. Conclusion to the country. Issue thereon.

To plea 4. “That the said rails and palings were not placed upon any of the footways of the streets, lanes, ways,” &c., “within the said parish of Greenwich, within and under the provisions of the said statute in the said plea mentioned, in manner and form, &c. Conclusion to the country. Issue thereon.

On the trial, before PARKE, B., at the Maidstone Summer assizes, 1844, it appeared that the defendant had cut down palings belonging to the plaintiff on the Ballast Wharf to the length of about six feet ; and the principal question of fact was whether the ground on which they stood was or was not a public footpath. Evidence was given for the defendants to show the existence and direction of the alleged public way. The learned Judge left it to the jury to say, first, whether there was an ancient footpath over Ballast Wharf ; and, secondly, whether the whole of the palings cut down stood upon the ancient footpath. The jury found that there was an ancient footpath ; but that the fence cut down did not all stand upon it. The plaintiff’s counsel contended that the plaintiff was entitled to a verdict in respect of that part which did not stand upon the footpath : but the learned judge was of opinion that the defendant must have a verdict generally on the last two issues. He referred to *Bowen v. Jenkin*, 6 A. & E. 911, and declined to reserve the point. Verdict for plaintiff on the first issue, and on the first of two issues joined upon the replication to the second plea : for defendants on the second of those \*issues. For defendants on the issues upon the replication to the [\*177 third and fourth pleas.

*Platt*, in the ensuing term, obtained a rule nisi for a new trial (a) on the ground of misdirection. In this vacation, (b)

*Bramwell* and *Lush* showed cause. *Bowen v. Jenkin*, 6 A. & E. 911, decides this case. There, in an action for disturbance of common by

(a) The rule was erroneously drawn up in the alternative ; to enter a verdict for the plaintiff on the last two issues, or for a new trial.

(b) December 4th. Before Lord Denman, C. J., Patteson, and Wightman, Js.

turning on cattle, the defendant pleaded common appurtenant in the locus in quo, and that he, in exercise of that right of common, turned on the said cattle, being his own commonable cattle levant and couchant on the land to which the common appertained: the plaintiff replied that "all the said cattle in the said declaration mentioned" "were not the defendant's own commonable cattle, levant and couchant," &c.; and there was no new assignment. Issue being joined on the replication, this court held the defendant entitled to succeed on proof that he possessed land in respect of which he had a right to send cattle upon the common, and that some of the cattle were levant and couchant; and that the plaintiff should have new assigned if he wished to show that some of the cattle turned in were not cattle which the defendant might lawfully place there. The argument for the defendant in that case, and note (2) to *Mellor v. Spateman*, 1 Wms. Saund. 346 f, 6th ed., there cited, apply strictly to the question now raised. If it was intended by the replication here to allege, first, that the defendants had no right to cut down the palings anywhere, but that, \*178] assuming them to have had a right anywhere, then, secondly, their acts were done extra viam, the defendants ought to have had an opportunity of answering the latter alternative, as by pleading a release, or satisfaction; but from this the conclusion to the country debars them. If the declaration was meant to include palings not on the place alleged to be a highway, the pleas narrowed the subject matter, and the plaintiff, if he did not wish to accept a narrowed issue, should have new assigned; *Rogers v. Custance*, 1 Q. B. 77. That was done in *Monkman v. Shepherdson*, 11 A. & E. 411, where, in an action by a servant for wages, the defendant pleaded an agreement that, if plaintiff should be drunk during his service, all wages then due should be forfeited, and the plea averred that, after the wages were due, plaintiff became drunk, whereby the wages were forfeited. The plaintiff replied a waiver of the forfeiture, and also new assigned, stating that parcel only of the wages claimed in the declaration became due before the drunkenness, and the residue after, and that plaintiff declared for both: and, on demurrer for duplicity, this was held to be rightly pleaded; because the plea assumed the action to be brought only for wages which had accrued due before the intoxication, and, if the replication had simply met the averments of that plea, the plaintiff's case would have been confined to the demand there pleaded to: a new assignment, therefore, was necessary for the purpose of pointing the declaration to more than the plea answered. A similar form of replication should have been used here. The present pleas assume that the palings mentioned in them are those mentioned in the declaration, and no other: \*179] the replication admits that view, and acknowledges the existence of a way, but denies that any of the palings broken down were on it. The issues are made to turn upon the identity of the way, not of the thing destroyed. In *Moses v. Levy*, 4 Q. B. 213, 218, Lord DENMAN, C. J., delivering the judgment of the court, said:



“Where the declaration itself points at one particular transaction, and the plea applies itself to another particular transaction of the same sort, different from that intended by the declaration, or where the plea narrows the declaration contrary to the intention of the plaintiff, a new assignment is necessary, but not where the declaration is general, and the plea also.” Here the plea was not as general as the declaration. If a verdict were entered for the plaintiff on the last two issues because his complaint related to the palings not on the highway, then, the plea remaining unanswered as to the palings which were upon that way, a verdict ought not to be entered against the defendant as to these: but how could the court apportion?

*Buckle and Peacock*, contra. A new assignment is not necessary unless the plea selects some particular matters of complaint from the declaration and justifies those. Where the plea is general, no new assignment is required; and the proof in support of the plea must be co-extensive with that required to support the declaration. [PATTESON, J. If the plea selects a particular matter of complaint from the declaration, the plaintiff is not obliged to new assign on that account, because the defendant must plead to the other matters or remain \*undefended as to those. [\*180 But here the plea is more specific than the declaration, and professes to answer the whole. WIGHTMAN, J. The declaration speaks of a close generally.] That contains an infinity of places. If the locality was material, the defendants should have fixed it. [PATTESON, J. They do. WIGHTMAN, J. The difficulty is, not as to the close, but as to the rails. In point of fact there was a highway; but part of the rails were on it, and part not. If you had new assigned as to the rails which in fact were not on the highway, you might have had a verdict for that number. But, not doing so, you are taken to agree that all the rails in question were upon the place which the defendants supposed to have been a highway.] The consequence of that argument would be that, if the defendants had cut down rails on twenty places, and one of those was the highway, the plaintiff could not recover. PATTESON, J. The same argument may be put conversely on the other side. It turns on the pleadings. If you, instead of new assigning, merely traverse the plea, you debar them from answering or suffering judgment by default as to any rails which may not have stood on the highway. They had a right to suppose that you brought your action for certain trespasses, which they justify: and you reply without distinguishing those trespasses from any others to which the justification may not extend.] The justification applies to all the trespasses; and the pleas allege that they are the same supposed trespasses of which the plaintiff has complained. The plaintiff does not new assign, and could not do so consistently with his case, because the hundred yards of paling to which the pleadings apply are in fact the same as those in respect of which he declares. But his \*replication has the effect of a new assignment, for it shows that the acts complained [\*181

of are not those which the defendants allege to have been done upon the highway. [Lord DENMAN, C. J. You are obliged to admit that they are the same in part; but your replication does not show which part is not the same. WIGHTMAN, J. *Bolton v. Sherman*, 2 M. & W. 395, 401, is an excellent illustration of this subject. There the plaintiff declared for the conversion of ten horses; the defendant justified with a *quæ est eadem*; but the plaintiff new assigned; the new assignment extended to the same number of horses as the declaration; but the proof in support of it applied to only three exclusively of those referred to by the plea; and the plaintiff recovered for the three.] There a single act was done, which was, or was not, protected by a special contract; therefore a new assignment might be proper. Here the alleged injury must necessarily consist of distinct entries into numerous parts of the close. To make such a case analogous to *Bowen v. Jenkin*, 6 A. & E. 911, it ought to have appeared that each distinct act was accompanied by some exercise of right. The whole question in the present case is, whether the defendant has specified what he understands the plaintiff to mean, so as to give him notice that the subject matter as understood by him is different from that contemplated by the plaintiff. If he had done so, a new assignment would have been necessary. [PATTESON, J. Has not he done so here?] If a plaintiff declares for several trespasses, and the defendant pleads leave and license, it is not sufficient for him to prove that one trespass was committed by license, though the plaintiff \*has not new  
 \*182] assigned, but replied *de injuriâ*. [PATTESON, J. That is an anomalous case, even if *Barnes v. Hunt*, 11 East, 451, which decides it, can stand.] The judgments delivered there do not put the case of license on any peculiar ground. [WIGHTMAN, J. It has been said since, that *Barnes v. Hunt* is an authority only for cases of leave and license.(a) PATTESON, J. That has been said because the judges did not like to overrule the case; but I think it is full of fallacy.] In *Freeman v. Crafts*, 4 M. & W. 4, to a declaration in debt claiming 10*l.* for goods sold and delivered, 10*l.* for work and labour, and 10*l.* on an account stated, the defendant pleaded payment; and it was proved that he had paid more than 30*l.*, but that, on the whole balance of accounts, the plaintiff was still creditor. The Court of Exchequer held that he was entitled to recover, though he had not new assigned; for that, on the pleadings, the defendant undertook to prove payment of any sum which the plaintiff could claim under the declaration. [PATTESON, J. There the question related only to the occasion of a particular payment. Here the defendant says generally that he has a justification for every thing that he has done; and the plaintiff denies that by his replication. Then, at the trial, he says that he proceeds for the paling which was not on the highway.] *Rogers v. Custance*, 1 Q. B. 77, is no authority for the defendants. There the

(a) See *Bowen v. Jenkin*, 6 A. & E. 919. See also the dictum of Parke, B., in *Solly v. Neish*, 4 Dowl. P. C. 248, 252; S. C., 2 C., M. & R. 355, 5 Tyrwh. 625.

declaration was general, for work and labour; the plea stated that the work was done under contract for a certain price, but that a contract for a lower price was substituted; that the debt claimed in the declaration accrued under that \*contract, and that defendant paid and plaintiff accepted the amount. The plaintiff traversed payment and acceptance of the sum mentioned in the plea; and it was held that he could not give evidence of any claim not included in the second contract because he had not new assigned. There the declaration was general, and the plea restricted. Here the plea is co-extensive with the declaration: the plaintiff could not new assign without claiming something to which he does not in fact assert any title. [PATTESON, J. Your argument makes the quantity stated in the declaration material.] The case is analogous to those in which it has been held that, if a plaintiff, declaring in trespass, names the close, and the defendant pleads liberum tenementum, generally, the plaintiff may recover if he proves a trespass in any close of his bearing the name, though the defendant may prove that he had a close of the same name, situate in the same parish, and there is no new assignment; *Cocker v. Crompton*, 1 B. & C. 489: the principle of which is explained by *Smith v. Royston*, 8 M. & W. 381, and was acted upon in *Lempriere v. Humphrey*, 3 A. & E. 181. [PATTESON, J. In *Cocker v. Crompton*, the plaintiff laid all the trespasses in a close named as his, and the defendant did not limit the description. Here the trespasses are laid in the Ballast Wharf; the defendants plead that they were committed on a highway there: if the plaintiff meant to rely on trespasses committed elsewhere in the close, he should have new assigned.] In *Ellison v. Isles*, 11 A. & E. 665, to a declaration in trespass quare clausum fregit, describing the close, a right of way over that close was pleaded; the plaintiff new assigned, alleging a trespass out of the \*way in the plea mentioned; and the defendant pleaded thereto that plaintiff had obstructed the said highway in the plea mentioned, wherefore defendant passed out of the highway, &c. The plaintiff replied De injuriâ, and gave evidence applying to a way over the close, which way had not been obstructed: and it was held that the defendant could not insist upon applying his plea to another way over the same close, which the plaintiff had obstructed. [PATTESON, J. He had expressly directed his justification to that way which the plaintiff admitted. If he meant a different way, he should have pleaded accordingly.] *Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation, (December 11th,) delivered the judgment of the court.

This was an action of trespass for breaking and entering a close of the plaintiff, and cutting down and destroying the rails and palings of the plaintiff there standing and being on the close, to wit, one hundred yards of the rails and one hundred yards of the palings. The defendants justified all the trespasses generally under a right of way, and because the

rails and palings, at the time when, &c., were standing in and across the way and obstructing it. The plaintiff replied that the said rails and palings were not then standing in or across the way; and issue was joined. Upon the trial it was proved that some of the rails cut down by the defendants were standing upon the way, and some not: and it was contended, for the plaintiff, that he was entitled to recover in respect of the rails which were not standing upon the way, under the issue joined upon the replication, and without any new assignment.

\*185] \*We are, however, of opinion that the plaintiff is not entitled to recover, and that, as the number and quantity of the rails were immaterial, and alleged generally in the declaration, and divisible, if the plea, which apparently covered the whole, answered a part only, the plaintiff ought to have new assigned if he meant to insist that *some* of the rails were not standing upon the way though others were.

The case of *Bowen v. Jenkin*, 6 A. & E. 911, is directly in point. That was an action for disturbing the plaintiff's common by turning on cattle: the defendant pleaded a right of common for cattle levant and couchant, and that the cattle in the declaration mentioned were the defendant's cattle levant and couchant. The plaintiff replied that all the cattle in the declaration mentioned were not levant and couchant: and issue was joined. It appeared by the evidence that, at the time of the injury complained of, some of the cattle were levant and couchant, and others not; and it was held that the effect of the plaintiff's replication was that the levancy and couchancy was untruly alleged by the defendant of all the cattle, not that it was truly alleged of some and falsely of others. The plea answered the complaint as to some of the cattle; and, if the plaintiff meant to draw a distinction between such of the cattle as were really included in the justification and such as were not, he should have new assigned.

The present case falls within the rule, collected from a review of the older authorities, laid down in the note to the case of *Greene v. Jones*, 1 Wms. Saund. 299, 300, note (6), that, where the declaration is general, and the subject matter divisible, and \*the plea apparently  
\*186] answers the whole, but really only answers a part, the plaintiff must new assign as to the part not really answered. The defendants by their plea say that the plaintiff has complained of cutting rails in the highway; and, if the plaintiff merely traverses the allegation that the rails were in the highway, and some of the rails cut actually were there, it will be taken that both parties agreed that those were the rails in question: and, if the plaintiff meant to show that the plea applied to *part* only, and not to the whole, he should have new assigned. Such a traverse as that taken by the plaintiff does not deny the *quæ est eadem*, but admits it.

The case of *Barnes v. Hunt*, 11 East, 451, was much relied upon for the plaintiff; but we think that it must be considered an authority only

with respect to the plea of leave and license, as observed by Mr. Justice LITTLEDALE in the case of *Bowen v. Jenkin*, 6 A. & E. 919.(a)

Our judgment therefore is for the defendants. Rule discharged.(b)

(a) In *James v. Lingham*, 5 New Ca. 553, Tindal, C. J., and Colman, J., considered the doctrine of *Barnes v. Hunt* to be applicable to a plea of payment.

(b) See *Aldred v. Constable*, 6 Q. B. 370. And see the next two cases.

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1<sup>st</sup> count. Second count in trover for goods, to wit, ten pieces of timber.

5th plea, as to the pieces of timber in the 2d count mentioned, that they were obstructing a public navigable river, and defendant, having occasion to navigate, &c., removed the said pieces of timber, &c., which are the same grievances, &c.

Replication, as to the fifth plea, which is pleaded to the causes of action in the 2d count mentioned, and so far as they relate to the pieces of timber in the 2d count mentioned, that defendant of his own wrong, &c. committed the grievances, &c. so far as they relate, &c., in manner and form, &c.: and new assignment, that plaintiff sued, not only for the grievances in the 5th plea mentioned, &c., but also for, &c., alleging trover and conversion of pieces of timber other than, and different from, those in the 5th plea mentioned, and that defendant, for another and a different cause than that in the 5th plea stated, converted the last-mentioned goods in manner and form as the plaintiff hath above declared, &c.

Held, on special demurrer, that the replication was not bad for duplicity or as enlarging or departing from the declaration; and was well pleaded.

CASE. The last count of the declaration was in trover for "certain goods and chattels, to wit, ten barges, ten wagons, ten weighing machines, ten weights, ten chains, ten ropes, ten pieces of wood, and ten pieces of timber of great value," &c.

The 4th plea justified, as to the wagons, weights, and weighing machines, alleging that they were wrongfully standing in and obstructing a public highway, and defendant, having occasion to use the way, removed them, and carried them to a small distance, &c., which are the same, &c.

5th plea, as to the causes of action so far as they relate to the barges, chains, ropes, and pieces of wood and timber in the last count mentioned, that the river Thames, that is to say, a certain part of the said river lying and being, &c., was a public navigable river and the queen's ancient and common highway, and all the liege subjects, &c. had and still of right ought to have a free passage and navigation in, upon, and along the said river for their vessels, &c. going and returning in, upon and along the said river upon lawful occasions: wherefore, and because the said barges had been and were before and at the said time when, &c., wrongfully placed, moored, and fastened \*with the said chains and ropes, and pieces  
of wood and timber in the last count mentioned, and were then  
so fastened, lying, and being in, upon and along the said river, and obstructing the same and the navigation thereof, &c., justification, stating that defendant, a liege subject, having occasion to navigate, &c., removed the said barges, chains, ropes and pieces of wood and timber, &c., and

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carried the same to a small and convenient distance, &c.: which are the same, &c. Verification.

Replication to plea 4, De injuriâ. Issue thereon.

To plea 5. "As to the plea of the defendant by him lastly above pleaded, and which plea is pleaded as to the causes of action in the said last count mentioned, so far as they relate to the barges, chains and ropes, pieces of wood and timber in the said last count mentioned," that defendant, of his own wrong, &c., committed the said grievances in the last count mentioned "so far as they relate to the said barges, chains and ropes, pieces of wood and timber, in the said last count mentioned, in manner and form as in the said last count alleged." Conclusion to the country.

New assignment: (a) that plaintiff "issued his writ against the defendant, and declared and brought this action thereupon, not only for the several grievances in the 5th plea mentioned and therein attempted to be justified, but also for that the plaintiff heretofore, to wit, on," &c., "was lawfully possessed as of his own property of certain goods and chattels, to wit, five pieces of wood and five pieces of timber, being other than and different from the said pieces of wood and timber in the 5th plea mentioned, and of great value, to wit," &c; "and, being so possessed, the \*189] plaintiff afterwards, to wit, on," &c., "casually lost the said goods and chattels in this new assignment first mentioned out of his possession; and the same afterwards, to wit, on," &c., "came to the possession of the defendant by finding: yet the defendant, well knowing the said last-mentioned goods and chattels to be the property of the plaintiff," &c., "but contriving," &c., "hath not as yet delivered the said last mentioned goods," &c., "although often requested so to do, and afterwards, to wit, on," &c., "for another and different cause than the said cause in the 5th plea stated, converted and disposed of the said last-mentioned goods and chattels to his own use, in manner and form as the plaintiff has above declared against the defendant; to the damage," &c. "Wherefore," &c.

Demurrer, alleging "that the said replication and new assignment are not sufficient in law," (b) and assigning for causes (among others): "That the said replication and new assignment are double, in this, that the said replication without the said new assignment is a full and complete answer to the said last plea, which said last plea it is admitted by the said replication is pleaded to the causes of action in the last count mentioned so far as they relate to the barges, chains and ropes, pieces of wood and pieces of timber in the last count mentioned, and yet the plaintiff by the said new assignment seeks to give another and distinct answer to that part of the said plea which justifies the conversion of the pieces

(a) As to new assignment in trover, see *Hawthorn v. Newcastle, &c. Railway Company*, 3 Q. B. 734, note (a), 739.

(b) See *Monkman v. Shepherdson*, 11 A. & E. 411; note (a) to p. 412.



of wood and pieces of timber in the last count mentioned." That the replication and new assignment are also bad in this, "that it is admitted by the said replication that the said plea is pleaded as to the causes of action in the last count \*mentioned so far as they relate to the barges, chains and ropes, pieces of wood and timber, in the last count mentioned; and by the said plea the joint conversion of those goods and chattels, which is alleged in the last count, is justified; yet the plaintiff by his new assignment has sought to enlarge the causes of action in the last count mentioned, by alleging in the new assignment a distinct and separate conversion of the pieces of wood and pieces of timber in the new assignment mentioned, other and different from the joint conversion alleged in the last count, and other and different from the conversion by the last plea justified. And the said new assignment is in that behalf a departure from the declaration." Also, "that the plaintiff, having by the last count of his declaration complained of one single act of conversion of the goods and chattels in the last count mentioned, has by his replication and new assignment attempted to introduce and put in issue several distinct acts of conversion with respect to goods and chattels mentioned in the said last count, and also in respect of other goods and chattels not mentioned in the said last count." Joinder in demurrer.(a)

The demurrer was argued in last term.(b)

*Hugh Hill*, for the defendant. A new assignment ought to show that the causes of action alleged in it are those alleged in the declaration: that does not appear in the present case, as to the conversion or the things converted. The contrary may be inferred. The declaration, being in trover, states a single matter of complaint, the conversion of certain goods, among which \*are pieces of wood and timber: the fifth plea justifies the supposed conversion as to those goods: the replication De injuriâ extends to the whole cause of action covered by the plea: and then the new assignment alleges a conversion of other goods, to wit, other pieces of wood and timber than those in the plea mentioned. The replication, therefore, enlarges the ground of action laid in the declaration. And the replication is double, because the De injuriâ is a complete answer as to all the goods mentioned in the plea, and yet the new assignment professes to answer again as to different pieces of wood and timber, converted for a different cause. In *Cheasley v. Barnes*, 10 East, 73, where the defendant replied De injuriâ and new assigned, and the new assignment amplified the cause of action stated in the count, the replication was held bad on this ground, and for duplicity. In *Loweth v. Smith*, 12 M. & W. 582, and *Worth v. Terrington*, 13 M. & W. 781, which may be cited for the plaintiff, the replication De injuriâ with a new assignment was not held double; but the whole related to the charge of

(a) The plaintiff took some objections to the 5th plea; but no decision was pronounced on these.

(b) Novemoer 18th. Before Lord Denman, C. J., Williams, and Wightman, Js

trespass contained in the declaration; the trespass was one, but continued, and divisible in point of time. Here, as in *Cheasley v. Barnes*, the two parts of the replication introduce distinct and independent subject matters, *De injuriâ* being a reply as to the goods and cause of taking mentioned in the plea, and the new assignment as to other and different goods and another and a different cause.

Sir J. Bayley, *contrâ*. Neither the declaration nor the fifth plea makes  
 \*192] the number of barges and pieces of \*timber material: but the plea professes to justify as to all. Then, if the plaintiff had merely taken issue on the plea, and the evidence had been that some of the pieces of timber were obstructing the navigation and some not, the defendant would have succeeded. It was therefore unavoidable that he should new assign.<sup>(a)</sup> The propriety of this course, where the subject matter is divisible in respect of time, appears from *Lambert v. Hodgson*, 1 Bing. 317; *Pyewell v. Stow*, 3 Taunt. 425; and *Monprivatt v. Smith*, 2 Camp. 173, and from the result of the replication to the second plea in *Bradbee v. Christ's Hospital*, 4 Man. & G. 714; and, where the subject matter is divisible in respect of numbers, from *Vivian v. Jenkin*, 3 A. & E. 741, 759, where Lord DENMAN, C. J., delivering the judgment of the court, said: "The plaintiff has not only divided the plea applicable to the second count from the plea as to the first count, but he has split this part of the plea into two parts; and as to one part, he replies *de injuriâ suâ propriâ*; and, as to the other, he replies *excess*. We see no objection in point of law to his doing so, because the goods on which the defendants have trespassed may some of them not have been on the close at all; and such of them as were, they may have treated with more force and violence than was necessary for the removal of them; and, if such was the state of things, the plaintiff ought to be permitted to present the facts in his answer to the defendants' plea; and, though this kind of pleading be very uncommon, we see no objection to it in point of law." *Monkman v. Shepherdson*, 11 A. & E. 411, is also an instance in which the objection  
 \*193] of duplicity failed \*where the subject was in its nature divisible, and the plaintiff both new assigned and replied other matter. And in *Kavanagh v. Gudge*, 7 M. & G. 316, 322, where, to trespass for breaking and entering plaintiff's dwelling-house, and expelling, assaulting and beating her, the defendant pleaded leave and license, the court held that, although the license would have been no answer to a substantive charge of battery, yet, as the battery was stated merely in aggravation, and the plaintiff had not new assigned, the license, which was a good justification of the other matters complained of, covered the battery also. As to the form of the new assignment: its language, in the conclusion, plainly identifies the pieces of wood and timber there mentioned with the wood and timber mentioned in the declaration, though it professes to introduce a subject matter other than that spoken of in the plea. It is an

(a) See *Brasgirdle v. Peacock*, *antè*, p. 174.

error to suggest that the new assignment supposes two conversions: the conversion there mentioned is the same as that in the declaration, so far as the declaration is unanswered by the plea. This was the construction given to the pleadings in *Bolton v. Sherman*, 2 M. & W. 395.

*H. Hill*, in reply. It is not shown by any of the authorities that a replication *De injuriâ*, answering an entire plea, and a new assignment, alleging distinct matter as an answer to the same plea, can be supported. *Monprivatt v. Smith*, 2 Camp. 173; *Pyewell v. Slow*, 3 Taunt. 425; and *Lambert v. Hodgson*, 1 Bing. 317, where it was said that the plaintiff might have new assigned, were cases of a single trespass, \*laid [\*194 with a continuando. A like remark applies to *Bradbee v. Christ's Hospital*, 4 Man. & G. 714. In *Vivian v. Jenkin*, 3 A. & E. 741, the second count of the declaration alleged trespasses committed by injuring several articles of property; the plaintiff, in answer to a justification, dealt with the trespasses as distinct, replying *De injuriâ* as to part of the goods, and excess as to another part; and there was no objection to this division of subject matters which were not identified by other parts of the pleadings. In *Kavanagh v. Gudge*, 7 M. & G. 316, the license was pleaded as to all the trespasses, and proved as to all; the only question was whether it could, technically, justify a battery; and the chief justice suggested that the plaintiff should have new assigned excess. *Bolton v. Sherman*, 2 M. & W. 395, furnishes no answer to the objection that different conversions are relied upon here: in that case the replication consisted of a new assignment only, and could not be construed as suggesting two conversions. [WIGHTMAN, J. Suppose the plaintiff, here, had gone to trial upon a mere traverse of the justification, and you had proved it as to four pieces of timber, but not as to a fifth.] The defendant would have succeeded.(a) [WIGHTMAN, J. You put a hardship upon the plaintiff, if you entitle yourself to a verdict on the circumstances of justification as to part, and do not allow him to show that another part was taken under different circumstances.] The plaintiff should have declared for several conversions. [WIGHTMAN, J. The conversion is one, but rightful as to part and wrongful as to another part.] The concluding words of the new assignment \*are relied upon as identifying the goods [\*195 there spoken of with those mentioned in the declaration; but the words "in manner and form as the plaintiff has above declared" are not sufficient for that purpose. The two parts of the replication are repugnant: *De injuriâ* is replied to the 5th plea generally, reciting it as pleaded to the causes of action in the last count mentioned, so far as they relate to the barges, timber, &c., in the last count mentioned, and alleging that the defendant of his own wrong, &c., committed the grievances in the last count mentioned, so far as they relate to the barges, timber, &c., therein mentioned; but the new assignment relates to pieces of timber different from those mentioned in the 5th plea. [WIGHTMAN, J. The

(a) See *Bracegirdle v. Peacock*, ante, p. 174.

ground taken is that your plea apparently covers the whole subject of complaint, but really does not.] *Cur. adv. vult.(a)*

Lord DENMAN, C. J., in this vacation, (December 11th,) delivered the judgment of the court.

This was an action on the case with a count in trover for seizing and converting, amongst other things, divers, to wit, ten pieces of timber. To this count the defendant pleaded generally that the articles mentioned in the declaration were obstructing a navigable river, and that he removed them. To this the plaintiff replied *De injuriâ*, and also new assigned, that he was possessed of five pieces of timber different from those mentioned in the plea, and that he brought his action for converting those \*196] as well as the pieces of timber mentioned in the \*plea. To this there was a demurrer for duplicity: and it was contended for the defendant that, as the plea was to the whole of the count generally, it covered all that was stated in it, and that the plaintiff could not new assign.

We are however of opinion that the plaintiff in this case was entitled both to traverse and to new assign. The number of pieces of timber is alleged *generally* in the declaration; and the plaintiff is not bound by the exact number, but is at liberty to prove less. The plea is as general as the count, and *apparently* answers it. The allegation of number in the declaration is a *divisible* allegation; and the plea, though apparently answering the whole, may, in truth, only answer a part; and, if that were so in fact, and the defendant had a justification as to some of the pieces of wood but none as to the others, the plaintiff must new assign as to those to which the justification does not apply; for, if he merely take issue upon the plea, he will be taken to admit that the justification applies to all that is alleged in the declaration. *Bowen v. Jenkin*, 6 A. & E. 911, decides this point expressly. The cases upon the subject will be found collected and commented upon in the notes to the case of *Greene v. Jones*, 1 Wms. Saund. 299, 300, (6th ed.) and fully warrant the course which has been pursued by the plaintiff: and the later cases are in accordance with these authorities.

Our judgment therefore in this case is for the plaintiff.

Judgment for plaintiff.(b)

(a) Lord Denman, C. J., said that the court would consider this case and *Polkinhorn v Wright*, (which had been argued on a previous day; p. 197 post,) together.

(b) See the next case.

**\*POLKINHORN against WRIGHT.**

[\*197]

**Declaration** charged that defendant, to wit, on the 1st January, 1844, with force and arms, "assaulted" plaintiff, and "then," with great force, &c., seized and shook plaintiff, and dragged him about, and struck him many blows, by means of which he was hurt and wounded, and was sick, &c., and so continued for a long time, to wit, one week, &c.

**Plea 2.** That defendant was lawfully possessed of a close, and a gate belonging to it, and plaintiff, a little before the time when, &c., with force and arms, and with a strong hand, and against the will of defendant, attempted to break open, and did then, thereby unlawfully break open, the gate, and in breach of the peace, did thereby attempt forcibly to enter and unlawfully trespass upon the close, and would then unlawfully and forcibly, &c., have effected such attempt, if defendant had not defended his possession; whereupon defendant, being in his close, during the unlawful attempt, defended his possession and resisted such attempt; and, because he could not successfully resist without, in a slight degree, committing the trespasses, he did a little unavoidably, &c., commit the trespasses in the declaration, using no unnecessary force, which are the trespasses complained of.

**Plea 3.** That defendant was lawfully possessed of a cow being in a certain close, and plaintiff, a little before the time when, &c., did, against the will of defendant, endeavour to drive away, and dispossess defendant of, and was driving away from the close, the cow, and dispossessing defendant of the same, and would then unlawfully, forcibly, and in breach of the peace, have driven away, and dispossessed defendant of, his said cow; wherefore defendant, &c., (justifying as before, mutatis mutandis.)

On demurrer to the replication, held:

1. That, the trespass on the part of the plaintiff being alleged by the plea to be forcibly made, the justification was sufficient, though it was not alleged that the plaintiff had been requested to desist.
2. That the pleas were not objectionable for omitting to show a good justification of the wounding.
3. That the third plea was not objectionable for omitting to show that the cow was on defendant's close.

**Held also:** that the declaration showed only one trespass committed on a single occasion; and, therefore, that, to the above pleas, the plaintiff could not reply both *De injuria*—and also that defendant committed the trespasses in the declaration on other occasions than those in the pleas mentioned. On special demurrer to the replication for duplicity.

**TRESPASS.** The declaration charged that defendant, "to wit, on the 1st day of January, A. D. 1844, with force and arms, &c., assaulted" plaintiff, and "then," with great force and violence seized and laid hold of and shook plaintiff, and pulled and dragged him about, and gave him many violent blows, &c., by means of which several premises plaintiff was then greatly hurt, bruised, and wounded, and became and was sick, &c., and so continued for a long space of time, to wit, one week, then next following, during all which time plaintiff thereby suffered great pain, and was hindered from transacting his affairs, &c.; and other wrongs, &c.

**\*Plea 2.** That defendant, before and at the time when, &c., was lawfully possessed of a certain close in the parish of, &c., in the county, &c., and of a certain gate of and belonging to the same close, and, being so possessed, the plaintiff, a little before the time when, &c., with force and arms, and with a strong hand, and without the license, &c., and against the will of the defendant, did then attempt to force and break open violently, and with a strong hand did then thereby unlawfully force and break open, the said gate, and, as much as in him the plaintiff lay, in breach of the peace, did then thereby attempt and endeavour forcibly to enter and trespass upon unlawfully the said close, and would then unlawfully and forcibly, and with a strong hand have effected such

unlawful attempt and endeavour, without the license of defendant and against his will, if defendant had not defended his said possession, &c.; whereupon defendant, being in his said close, and during the said forcible, wrongful, and unlawful attempt, &c., did, at the said time when, &c., defend his the defendant's possession of the said close and gate, and oppose and resist the said unlawful attempt, &c., as it was lawful, &c., on the occasion aforesaid; and, because defendant could not on the occasion aforesaid successfully oppose or resist, &c., without in a slight degree committing the trespasses in the declaration mentioned, he the defendant did, on the occasion aforesaid, and because the plaintiff then, there, on that occasion vehemently with force and with arms resisted and opposed the defendant with a strong hand, and then and there defied him, a little unavoidably and necessarily commit the trespasses in the declaration mentioned, using no unnecessary force, &c.: which are

\*199] the trespasses above complained of. And so defendant in fact saith that all the damage and injury that then happened or were occasioned happened to the plaintiff and were occasioned solely of the wrong of the plaintiff and not otherwise, in the defence by defendant of his said close, &c. Verification.

Plea 3. That defendant, before and at the time when, &c., was lawfully possessed of a certain cow, then being in and upon a certain close in the said parish of, &c., in the county, &c.; and, being so possessed, the plaintiff, a little before the said time when, &c., did, without the leave, &c., and against the will, of defendant, then attempt and endeavour to drive and convey away and to dispossess defendant of, and was, just before the said time when, &c., driving and conveying away from the said close, the said cow of the defendant, and dispossessing, &c., and would then unlawfully, forcibly and in breach of the peace, have driven and conveyed away, and dispossessed the defendant of, his said cow: wherefore defendant, at the time when, &c., did, at the said time when, &c., defend his possession of the said cow, and oppose and resist the said unlawful attempt, &c., as it was lawful, &c. on the occasion last aforesaid: and, because defendant could not on that occasion successfully oppose or resist such unlawful attempt, &c., without, in a slight degree, committing the trespasses, &c., defendant did, on the occasion last aforesaid, and because the plaintiff then, there, on that occasion, vehemently, &c., resisted, (as in plea 2,) a little unavoidably and necessarily commit the trespasses, &c.: using no unnecessary force, &c.; which are the trespasses, &c.: and so the defendant in fact saith that all the damage, &c., happened, &c.,

\*200] solely of the wrong of plaintiff, and not \*otherwise, in the defence by defendant of his said cow. Verification.

Replication to the second plea. That defendant, at the said time when, &c., of his own wrong and without the cause by him in his second plea alleged, committed the said several trespasses in the said plea attempted to be justified, in manner and form, &c. Conclusion to the country.



To the third plea. De injuriâ, in the like form.

New assignment: that plaintiff issued his writ against defendant, and declared, &c. thereupon, "not only for the said several trespasses in the said second and last pleas respectively mentioned and therein respectively attempted to be justified, but also for that the said defendant, at the said time when, &c., in the said declaration mentioned, with force and arms, &c., on other and different occasions than those in the said pleas respectively mentioned, and in a greater degree, and to a greater extent, and with greater force and violence than was necessary for the said several purposes in those pleas respectively mentioned, assaulted the said plaintiff, and, with greater force and violence than was necessary for the said several purposes in those pleas respectively mentioned, seized and laid hold of, and shook, pulled and dragged him, the said plaintiff, about: which said several trespasses, above newly assigned, are other and different trespasses than the said several trespasses in the said second and last pleas respectively mentioned and therein attempted to be justified. Wherefore, inasmuch," &c.

Special demurrer to the replication and new assignment, as regards the second plea, assigning for causes: That it neither properly traverses nor confesses and \*avoids, inasmuch as one part of the said replication and new assignment denies the said plea, and the other part of it [\*201 alleges that the action is brought for other and different trespasses than those justified by the said plea; and in this the replication and new assignment are inconsistent and repugnant: that they are repugnant to and inconsistent with the declaration, which complains of one assault only, whereas the said replication and new assignment assume and suppose that not only does it complain of one, but of many: that the replication and new assignment are double, in this, that it is attempted thereby inartificially to put in issue the alleged justification of the assault complained of, and also to set up another and different cause of complaint: and that so much of the replication as is by way of new assignment is in truth an entirely new declaration, setting out an entirely new, additional and different cause of action from that complained of in the declaration.

The demurrer, as to so much of the replication and new assignment as regarded the third plea, stated the same causes.

Joinder in demurrer.

The demurrer was argued in last term.(a)

*Montagu Smith*, for the defendant. The replication is bad for duplicity. On the face of the declaration one trespass only is complained of; whereas the replication both denies the matter of the plea and new assigns, which cannot be done where there is only one trespass; \**Cheasley v. Barnes*, 10 East, 73, *Franks v. Morris*, 10 East, [\*202 51, note (a). The cases are collected in note (6) to *Greene v. Jones*,

(a) November 14th. Before Lord Denman, C. J., Williams, and Wightman, Ja.

1 Wms. Saund. 299.(a) [WIGHTMAN, J. The declaration complains that the defendant assaulted the plaintiff, not that he made an assault; which distinction has been acted upon.] In *English v. Purser*, 6 East, 395, a declaration which stated that the defendant, on divers days and times, made an assault on the plaintiff, was held bad on special demurrer: and it follows that a new assignment to a plea of a justification, where the declaration complains of an assault only, cannot be joined with a traverse. But it is not true that the word "assaulted" can comprehend more assaults than one, where the declaration mentions only one day and one occasion. Some cases as to this are collected in note (1) to *Earl of Manchester v. Vale*, 1 Wms. Saund. 24. The laying a trespass with a continuando will enlarge the complaint so as to admit of such a new assignment as this, as well as if it were laid on divers days and times; *Loweth v. Smith*, 12 M. & W. 582; *Worth v. Terrington*, 13 M. & W. 781: but here one occasion only is mentioned in the declaration.

The plaintiff will object to the pleas on the ground that the matters therein set forth do not justify a wounding, and a wounding is alleged in the declaration. But it is alleged only under the per quod, and constitutes no part of the gist of the action: it need not therefore be justified; *Taylor v. Cole*, 3 T. R. 292; note to *Monprivatt v. Smith*, 2 Campb. 176; *Gates v. Bayley*, 2 Wils. 313.

\*203] \*Ogle, contra. If the declaration, here, necessarily confines the trespass complained of to a single momentary act, the replication cannot be supported; but that is not so. Any trespass, however long continued, on one day, might be proved under the declaration: the case therefore falls directly within the authority of *Loweth v. Smith*, 12 M. & W. 582, and *Worth v. Terrington*, 13 M. & W. 781. In fact, if a continued trespass be committed on one day, there is no other mode of laying the complaint; for it cannot be laid on divers days and times. [WIGHTMAN, J. Why not at divers times on the same day?] The word "assaulted" lets in more assaults than one, and is thus distinguishable from the words "made an assault." That appears from *Michell v. Neale*, 2 Cowp. 828, (b) and *English v. Purser*, 6 East, 395, where *Burgess v. Freelove*, 2 B. & P. 425, is explained and upheld. Suppose the fact to be, as is consistent with the declaration, that the defendant attacked the plaintiff and dragged him into a place different from the place of the attack. [WIGHTMAN, J. Why not admit the plea and merely new assign?] The plaintiff is entitled, in such a case, both to deny that the commencement of the attack is justifiable, and to complain also of its being continued under circumstances to which even the proposed justification is inapplicable. Such a state of things continually occurs in the case of a right of way, as PARKE, B., points out in *Loweth v. Smith*, 12 M. & W. 583. This form of replication imposes no difficulty on the defendant. In *Lucas v. Nockells*, 10 Bing. 157, 169, PARKE, B.,

(a) And see note (n) ib. 300 d. (6th ed.) (b) Where the marginal note is inaccurate

showed that a new assignment is bad which avers that the \*tres- [\*204  
passes mentioned in the plea were committed on other occasions:  
and the same objection, of course, applies where only one uncontinued  
trespass is complained of. But there is nothing here so to confine the  
declaration.

The pleas are bad because they do not justify the wounding. They  
are also bad because they do not show that the defendant, before assault-  
ing the plaintiff, requested him to desist from the alleged trespass on the  
defendant's property. The third plea is bad because it does not show  
that the cow was on the defendant's close: it might have been taken  
damage-feasant on the plaintiff's land; and then, if the defendant had  
attempted to rescue it, the plaintiff would have been entitled to take it  
from the defendant.

*Montagu Smith*, in reply. Where there are several trespasses there  
ought to be several counts, (a) or divers days and times may be alleged.  
Or, if there be a continued trespass, it may be described as such. The  
plaintiff therefore is under no difficulty.

As to the pleas: no request was necessary, because force on the part  
of the plaintiff is alleged; *Weaver v. Bush*, 8 T. R. 78. As to the third  
plea, the allegation is that the plaintiff attempted to dispossess the de-  
fendant of the cow: if the defendant had any right to do so, that should  
have been replied. *Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation, (December 11th,) delivered  
the judgment of the court.

This was an action of trespass for assault and battery: \*and [\*205  
the plaintiff, in his declaration, complained that the defendant,  
on the 1st day of January, 1844, assaulted the plaintiff, and then seized  
him, and dragged him about, and struck him many blows: by means  
whereof the plaintiff was greatly hurt, &c.

To this the defendant pleaded two pleas of justification: one in defence  
of the possession of a close and a gate, which the plaintiff endeavoured  
forcibly and with a strong hand to break and enter; and the other stating  
that the defendant was possessed of a cow, then being in a certain close,  
and that the plaintiff, against the will of the defendant, endeavoured to  
drive the cow away from the close and to dispossess the defendant of her,  
and would, forcibly and in breach of the peace, have driven away and  
dispossessed the defendant of the cow: wherefore the defendant resisted  
the attempt, and justifies the trespasses.

The plaintiff replied *De injuriâ* to these pleas, and also new assigned  
that he brought his action, *not only* for the trespasses mentioned in the  
pleas, but for that the defendant *on other and different occasions*, and with  
more force than necessary, assaulted and beat the plaintiff.

To this replication and new assignment the defendant demurred for  
duplicity, alleging that the declaration was confined to a single trespass,

(a) See note (1) to *Earl of Manchester v. Vale*, 1 Wms. Saund. 24.

and that the plaintiff could not take issue upon the justification and also new assign that he brought his action, *not only* for the trespass mentioned in the plea, but for trespasses *on other occasions* than those mentioned in the plea. And we are of opinion that the defendant is right, and that the new assignment is bad for the reason assigned in the demurrer.

\*206] \*It was contended for the plaintiff that, though a single day only was mentioned in the declaration, and there was no allegation that the trespasses were committed on divers days and times or with a continuando, yet that, as the defendant was stated to have "assaulted" the plaintiff, and not to have made "an assault," he was at liberty to show more assaults than one upon the same day. It is, however, quite clear that upon such a declaration the plaintiff is confined to trespasses on one occasion only: he is not bound to the precise time stated in the declaration, and might prove a trespass on another day: but, having treated the trespasses as occurring at one time and on one occasion, he cannot enlarge his declaration by a new assignment, and allege that he brought his action for several trespasses at several times. The authorities upon this point will be found collected in the note (1) to the case of the *Earl of Manchester v. Vale*, 1 Wms. Saund. 24; and *Burgess v. Freelove*, 2 B. & P. 425, and generally in the notes to *Greene v. Jones*, 1 Wms. Saund. 299, &c.

But the plaintiff contended that the defendant's pleas were bad for not alleging a request to desist before resisting with force. We do not think there is any weight in this objection. There is a manifest distinction between endeavouring to turn a man out of a house or close, into which he has previously entered quietly, and resisting a forcible attempt to enter. In the first case, a request is necessary; in the latter not. This distinction is expressly taken in *Green v. Goddard*, 2 Salk. 641; and *Weaver v. Bush*, 8 T. R. 78. In the present case the pleas \*justify the

\*207] trespasses on the ground of resisting a forcible attempt, in the one case to enter the defendant's close, and in the other to dispossess him of his cow; in neither of which cases was a request to desist necessary.

It was also contended that the last plea of justification was bad for not showing whose close it was that the cow was in, as it might be the plaintiff's, and he would be justified in driving her out. But the charge in the plea is, that the plaintiff was conveying the cow away *from the close* and *dispossessing the defendant of her*, and that he would *forcibly* have conveyed her away and dispossessed the plaintiff. The conveying the cow *from the close* and forcibly endeavouring to dispossess the defendant of her, would, *primâ facie*, warrant the resistance of the defendant, whoever might be the owner of the close: and, as the plaintiff has pleaded over and taken issue upon the plea, we do not think that objection available.

And our judgment therefore upon this demurrer is for the defendant.

Judgment for defendant.

## \*Baron DE BODE'S Case.

[\*208]

A party claiming to have been the owner of lands, by virtue of a cession to him from A., since deceased, offered evidence, before any other proof of the cession, that A. actually managed the property, and, while so managing, declared that he did so in the name of the now claimant. *Held (a)* admissible evidence.

On petition of right, a commission issued, and an inquisition was thereupon found and returned into chancery. Before any further proceeding, the suppliant filed a bill against the Attorney-General to perpetuate testimony, reciting the petition. A commission to examine witnesses issued thereupon. The suppliant proposed to the crown to join in the commission; but the crown did not consent; and the commission issued *ex parte*. The crown having traversed the inquisition, and the record being sent into this court: *Held (b)* that depositions taken under the commission to examine witnesses were admissible evidence on behalf of the suppliant, where the deponents were without the jurisdiction of the court.

Evidence being offered to prove the law of inheritance at a particular time in Alsace, one of the witnesses called for that purpose, a French lawyer practising in Alsace, stated on cross-examination that the feudal law had been put an end to in Alsace, *de facto*, "by the torrent of the French Revolution," and that there was a decree of the French National Assembly to that effect, of 4th August, 1789; and he said that he had learned this fact in the course of his legal studies. *Held (c)* admissible evidence, though no other proof was given of the contents of the decree. Per Lord Denman, C. J., Williams, and Coleridge, Js Dissentiente Patteson, J.

B. presented a petition of right to the queen, claiming certain money of the crown upon the facts therein stated, and praying that the crown would order right to be done, that the royal declaration should be endorsed on the petition to that effect, the petition referred to the Court of Chancery and duly received and enrolled, and the Attorney-General required to answer it, and that the suppliant might prosecute his complaint against him and such other persons as need might require, and have leave to make him and them parties, and pray to obtain relief. The queen referred the petition to the Court of Chancery; and the Chancellor endorsed "Let right be done:" and thereupon that court, by letters patent, appointed W. and others to inquire, upon the oath of jurors, of the truth of the matters in that petition: W., &c. returned into the Court of Chancery an inquisition taken accordingly; and finding

That B. was the eldest son of a nobleman who married an English woman in England, and that the father was born in Germany, and B. in England. That, before and since the peace of Westphalia, the lordship and land of Sultz, in Lower Alsace, was an ancient fief descendible in the male line. That in 1786, the line of feudatories having failed, it belonged to the Archbishop of Cologne to appoint a new line of feudatories; and that he nominated the father of B., who was invested.

That, before the treaty of Munster, Lower Alsace formed part of the empire of Germany. That, by that treaty, the Emperor of Germany ceded to the King of France all his rights and those of the empire in Lower Alsace, subject to a proviso that France should leave the then feudatories of Sultz in the liberty and possession they had theretofore enjoyed as immediately dependent upon the empire. That the treaty was ratified by subsequent treaties, the last named being that of Versailles between England and France in 1783.

That, in 1791, B.'s father ceded his rights to B., who was then fourteen years old.

That, in 1793, B. and his father left Sultz, and took refuge in the Austrian army. That afterwards, in the same year, it was, by the French Department of the Lower Rhine (in which Sultz was) decreed that B. and his father should be declared emigrants, and all their property confiscated, in order to its being sold or alienated, agreeably to the laws relating to emigrants. That, in pursuance of the decree, the lordship and lands of Sultz were seized as confiscated by the persons then exercising the powers of government in France, and were thenceforward treated as national property, and part thereof was sold under the authority of the French government, and the residue continued in the possession of that government until after the restoration of the house of Bourbon in 1814 and 1815.

That, by the treaty of Paris between Great Britain and France, 1814, it was stipulated that commissioners should examine the claims of his Britannic majesty's subjects upon the French government for the value of movable or immovable property unduly (*indûment*) confiscated by the French authorities, loss of debts, or other property unduly detained under sequestration, since 1792. That, by the treaty of Paris between Great Britain and France, 20th November, 1815, incorporating a convention of that date, it was provided that British

(a) P. 243, &amp;c.

(b) P. 244, &amp;c.

(c) P. 246, &amp;c.



subjects having claims against the French government, who had, in contravention of the after mentioned treaty of commerce, and since 1st January, 1793, suffered in consequence of confiscation or sequestration decreed in France, and their heirs and assigns, subjects of his Britannic majesty, should, conformably to the treaty of 1814, be indemnified and paid, after their claims should have been recognised as legitimate, and the amount fixed, as after expressed: namely, that the claims of such subjects arising from laws made by the French government or any other claim whatsoever (with an exception not comprising B.'s case) should be liquidated and fixed, and a sum be inscribed in the great book of the public debt of France, as a guarantee for the claimants, and further sums be furnished if necessary: three calendar months to be allowed to claimants resident in Europe to present their claims; and those of British subjects to be examined according to a mode directed. That by the treaty of commerce of 1786, in case of rupture between England and France, the subjects of either residing in the territory of the other were to be allowed to continue residence undisturbed while they conducted themselves legally, and, if ordered to withdraw, should have twelve months to do so, with their property, if they did not conduct themselves contrary to public order.

That, in December, 1815, M. and others were appointed, under the great seal, commissioners of liquidation, arbitration and deposit, to execute the convention. That, on 12th January, 1816, B. transmitted his claim to the Prime Minister of France, who received it on 9th February, 1816, but stated that he considered it inadmissible.

That, by a convention between Great Britain and France, April, 1818, it was agreed that, to effect payment of capital and interest due to British subjects, which had been claimed under the convention of 1815, an annuity of three millions of francs should be inscribed in the great book of the public debt of France.

That, by stat. 59 G. 3, c. 31, reciting that the commissioners had registered the claimants who presented themselves within the period prescribed in the convention of 1815, and had paid certain sums, and that three of the said commissioners, by commission under the great seal dated 1818, had been appointed commissioners of liquidation, arbitration and award, to act on behalf of his majesty in England, to consider the claims of British subjects properly presented, and the remaining commissioners had been appointed commissioners of deposit to receive the inscriptions from the French government; it was enacted that the commissioners of liquidation should apportion and distribute the sums provided by France, and order them to be paid to the claimants who had duly registered, in full if the sums paid were sufficient, in part if insufficient: the rejection of claims, subject to appeal to the privy council, to be final, and a discharge of both governments in respect of any registered claim; that unappropriated sums inscribed in the great book of France might, by the commissioners of deposit, on receiving directions from the English Secretary of State for Foreign Affairs or the Commissioners of the Treasury, be sold, and the proceeds transferred to the commissioners of liquidation, to be invested in public securities, for the purpose of being applied to liquidate claims, or, if all were liquidated, to such purposes as the Commissioners of the Treasury should direct; and that the public securities should be deposited in the Bank of England in the names of the commissioners of liquidation, and the produce paid for the purposes in the act specified.

That B.'s name and claim were not registered till after the passing of the statute.

That, after all the registered claimants were paid, a surplus of 482,000*l.* had remained with the commissioners of deposit, of which 200,000*l.* had been applied to satisfy claims tendered after the time mentioned in the convention of 1815, and admitted under the authority of the Commissioners of the Treasury given in May, 1826; and the residue was paid into the bank on the government account by direction of the Treasury under stat. 59 G. 3, c. 31.

That B.'s property, lost as above, with interest, was of the value of 364,000*l.*

The Attorney-General having traversed the matters of the inquisition, and a verdict on the traverse being found for B.: *Held* (a) (on cross motions, to enter the verdict for the suppliant, and to enter judgment for the crown non obstante verdicto,) That no right against the crown appeared upon the inquisition. For that,

Assuming (1) a petition of right to be maintainable for money claimed as debt or damages; and

Assuming (2) that B. was, for the purpose of this petition, a British subject:

First, No undue confiscation was alleged so as to satisfy the condition of the treaties of 1814 and 1815, nothing being shown but an adjudication by a French tribunal, which this court could not see to be contrary to the law of France, or pursuant to any law which this court could pronounce void as against British subjects.



Secondly. It did not appear that B.'s claim had been admitted and ascertained according to the treaties, his name not having been registered within the period provided for by the convention of 1815, and no order appearing to have been given by the Treasury to inquire into B.'s claim, or any request made to them for such order; and, further, it not appearing that no other claimant might possibly come in for the surplus; and the inquisition not showing whether or not any inquiry had been made by the commissioners of liquidation into the merits of B.'s claim.

Thirdly, That the queen could not be said to have received the money, the finding in the inquisition, that the surplus had been paid into the Bank of England on the government account, not showing that the sovereign had received a personal benefit from it.

"PLEAS, before our lady the queen, at Westminster, of Hilary Term, in the sixth year of the reign of our sovereign lady Victoria, by the \*grace of God," &c. "Amongst the Pleas of the Queen's Roll.(a) [\*209

"England (to wit). Be it remembered, &c., that the Right Honourable JOHN SINGLETON, Baron LYNDHURST, Lord High Chancellor of Great Britain, on the eleventh day of January in this same term, before our \*present sovereign lady the queen, at Westminster, hath delivered [\*210 hereinto court, with his own proper hands, a certain record, had before our said lady the queen in her Chancery, in these words, that is to say:

"Pleas, before the lady the queen, in her high Court of Chancery, on the 2d day of February, in the year of our Lord, 1839.

\*"Be it remembered that, on the day and year above men- [\*211 tioned, the said lady the now queen sent to the Right Honourable CHARLES CHRISTOPHER, Lord COTTENHAM, Lord High Chancellor of Great Britain, a certain petition of right, signed with the sign manual of the said lady the now queen, to be executed in due form of law, the tenor of which petition follows in these words.

"To the queen's most excellent majesty, most humbly beseeching, your faithful subject, Clement Joseph Philip Pen De Bode, Baron De Bode, a knight of several orders, now residing at No. 22 Lambeth Road, in the county of Surrey, sheweth to your majesty that your suppliant is the eldest son of the late Charles Frederic Louis Augustus, Baron De Bode, a baron of the Holy Roman Empire, and formerly a colonel of the regiment of Nassau-Saarbruck German infantry in the service of the King of France and knight of the royal and military order of Saint Louis, by Mary his late wife, daughter of the late Thomas Kynnersley, Esquire, of Loxley Park, in the county of Stafford; and that your suppliant's father was born on the family estate at Neuhoof, in the bishopric and principality of Fulda, now forming part of the electorate of Hesse, and was baptized at Neuhoof, in the said bishopric and principality; and that your said suppliant was born at Loxley Park aforesaid on the 23d of April, 1777, and was baptized at Uttoxeter on the 2d of May following.

"And your suppliant further sheweth," &c. The petition then stated (b)

(a) The proceedings were on the crown side.

(b) The petition is here not fully set out, except so far as is necessary to show the form of the proceeding; the judgment of this court having been founded exclusively on the facts as found in the inquisition.

\*212] that Sultz was an ancient fief, \*before and since the peace of Westphalia, (concluded between England and France in 1648,) and constituted part of the barony of Fleckenstein in Lower Alsace, and was descendible in the direct male line; and that the archbishops electors of Cologne were the protectors thereof, having power of appointing a new line of feudatories upon the failure of issue male; that in 1720, on failure of the then branch of feudatories, investiture of the fief was granted to the Prince of Rohan Soubise, a German prince; but, upon the failure of that line in 1786, the elector nominated to the fief Charles F. L. A. Baron De Bode, the suppliant's late father, who was invested. That, before the peace of Westphalia, Lower Alsace formed part of the empire of Germany, and was presided over by an hereditary officer called the Landgrave, who had no authority over the lands of the barons of Fleckenstein. That the Emperor of Germany and King of France were parties to the peace of Westphalia; and that the inheritance of the landgraviate of Lower Alsace belonged to the House of Austria. That, by the treaty of Munster, which formed part of the peace of Westphalia, the emperor, for himself and the House of Austria and the empire, ceded to France all their respective rights in the landgraviate of Lower Alsace, the same to be incorporated with the crown of France, but subject to a proviso that France should be bound to leave the barons of Fleckenstein in the liberty and possession they had theretofore enjoyed as dependent on the empire, and the King of France should rest content with the rights that had belonged to the House of Austria. That the treaty of Munster was ratified by the treaty of Nimeguen, 1679, by the treaty between England and Spain, 1680, by \*213] the truce \*of Ratisbon, 1688, by the treaty of Ryswick, 1697, by the treaty of Utrecht, 1713, by the treaty of Aix la Chapelle, 1748, by the treaty of Paris, 1763, and by the treaty of Versailles, 1783.

That in 1791 the father of the suppliant ceded to him all rights in the lordship of Sultz; that the suppliant was then 14 years old; that in 1793 the suppliant and his father took refuge in the Austrian army; and afterwards, in the same year, by a decree of the department of the Lower Rhine, they were declared emigrants and their property confiscated; and that it was afterwards seized and part of it sold, the rest continuing in the possession of the French government till 1814 and 1815. That the suppliant's father died in 1797.

The petition then stated certain provisions of the treaties of Paris of 1814 and 1815, and two conventions incorporated therein, (see p. 234, post,) providing for the indemnification, by the French government, of British subjects whose property had been unduly confiscated by it, and for the examination of the claims by commissioners. It appeared that by one of these provisions three months were allowed to claimants resident in Europe for presenting their claims; and, by another, a capital producing an annuity of 3,500,000 francs to be inscribed in the great book of the public debt of France, was provided as a guarantee fund for the

claimants; and there was a proviso for furnishing further sums if necessary towards the satisfaction of the claims. The petition then referred to the treaty of commerce of 1786; as to which see pp. 235 and 277, post.

Certain cases were then mentioned in which claims had been allowed.

\*The petition then stated that, by a commission under the Great Seal, dated 27th December, 1815, Colin Alexander Mackenzie and four others (see p. 236, post) were appointed commissioners of liquidation, arbitration, and deposit, for the purpose of carrying into effect, on the part of Great Britain, the provisions above mentioned. That on 13th January, 1816, being within three calendar months from the signing of the conventions, the suppliant, finding that the British commissioners had not arrived in France, and being then in the Russian service, delivered a memorial of his claim as a British subject under the convention of 1815 to the Russian ambassador at Paris, who had engaged to transmit the same to the Duke de Richelieu, then prime minister to the King of France and his minister for foreign affairs, to be forwarded by him to the mixed commission mentioned in the said convention, and composed of an equal number of Englishmen and Frenchmen; which commission had not then entered upon its duties or begun to sit. That, on the 9th February, 1816, the memorial was forwarded to the Duke de Richelieu, accompanied by a request that he would cause it to be transmitted to the commissioners of liquidation, or return it to the Russian ambassador. That the Duke de Richelieu sent a letter to the suppliant, stating that he considered the claim inadmissible, inasmuch as the suppliant's father was a German; but the duke did not return the memorial. That the letter was shown by the suppliant, on the 19th February, 1816, to the British ambassador, who was of opinion that the Duke de Richelieu entertained an erroneous view, and that the suppliant was a British subject, and stated that he would himself see C. A. Mackenzie, the English chief commissioner, on the subject. That the suppliant was unable to meet with C. A. Mackenzie until the 22d February, 1816, when he communicated the Duke de Richelieu's letter to C. A. Mackenzie, and at the same time delivered to him a memorial of his claim against the French government; when C. A. Mackenzie informed him that he (C. A. M.) concurred in the opinion that the Duke de Richelieu had taken an erroneous view, and that the suppliant was entitled to the benefit of the convention, and that the said Duke de Richelieu had done wrong in withholding the said memorial, and that he ought to have transmitted it to the commission, as being the proper authority to judge upon such cases; but, at the same time, C. A. M. informed the suppliant that the register of claims which contained the names of claimants resident in Europe had been closed the day before, namely, on the 21st February, and that he would consult with the commissioners, and the suppliant should be informed what was to be done. That the suppliant was required

to produce a certificate from the Duke de Richelieu, stating that he had preferred his claim to the French government, through the Duke de Richelieu, before 20th February. That he was informed by C. A. Mackenzie that, upon the production of such a certificate, his name would be inserted in the register of claimants: and, in consequence of such information, he presented a memorial to the Duke de Richelieu, from whom, on the 29th March, 1816, he received an answer formally certifying that he had received the claim on 9th February, 1816. That he communicated the answer, on 29th March, 1816, to C. A. Mackenzie. That, at the suggestion of the British commission, he, on 4th April, \*1816, presented to the commissioners a more detailed memorial of his claims, which the petition described. That, at a subsequent interview with C. A. Mackenzie, that gentleman informed him that the French commissioners were perfectly satisfied that the Duke de Richelieu had formed an erroneous opinion on the subject of nationality, but that, as his expressed opinion must in a certain manner be a guide for them to act by, they could not act counter to it without documentary evidence establishing the suppliant's nationality. That he was likewise informed by his French agent in Paris, who had seen the French commissioners on the subject, that they would make no difficulty as to inserting his name upon the list as soon as it should be brought in a regular way before them. The petition then stated that certain evidence on the subject had been transmitted to the commissioners. That, on 29th August, 1816, the British commissioners sent to the French commissioners a list of sixteen claimants under the convention, No. 7, with a letter stating that the British commissioners had discovered that these sixteen claims had been inadvertently omitted to be registered in the list closed and signed by them on 21st February preceding, and assuring the French commissioners that these claims had been presented to them before the signing of the said list, but had escaped their secretary in consequence of the great number of papers he had and the hurry he was in when he prepared the list, and therefore begged the French commissioners to admit these sixteen claimants in the said list. That, on 7th October, 1816, the French commissioners informed the British commissioners that the French government acquiesced in their request.

\*217] The petition then stated \*several communications with the commissioners, in which the latter required additional evidence; and it alleged that they had fallen into several errors, resulting in a delay of the recognition of his claim till 1818, when the mixed commission was dissolved. It further stated a case laid by him before counsel, and a favourable opinion thereon.

That, by a convention between Great Britain and France, signed at Paris, 25th April, 1818, for the final arrangement of the claims of British subjects against the French government, it was agreed that, in order to effect the payment and entire extinction as well of the capital as the interest thereon due to British subjects, of which the payment had been

claimed by virtue of the said first-mentioned convention, there should be inscribed in the great book of the public debt of France a perpetual annuity of 3,000,000 of francs, representing a capital of 60,000,000 of francs, to bear interest from the 22d March, 1818. And "that, upon the negotiations between the British and French governments, which led to the said convention of 1818, the sum granted by France, by way of final arrangement of the claims made by British subjects, was expressly increased and augmented for the specific purpose of providing for the liquidation of your suppliant's claims against the French government in respect of the loss of his said property at Sultz."(a)

That by stat. 59 G. 3, ch. 31, sect. 1, after reciting the appointment of the said C. A. Mackenzie, &c., as commissioners of liquidation, arbitration and deposit, and also that the commissioners had caused to be \*inscribed in a register the names of all the claimants who had presented themselves within the period prescribed by the convention, and had liquidated and caused to be paid certain sums therein mentioned; and also that the said C. A. Mackenzie and two others of the said commissioners had, by commission under the Great Seal, dated 15th June, 1818, been appointed commissioners of liquidation, arbitration and award, for the purpose of acting on behalf of his majesty in England, according to the provisions of all the several conventions thereinbefore recited, and to take into consideration all the claims of his majesty's subjects which might have been at due times and in proper form presented to them; and also reciting that the remaining two of the first named five commissioners had, by commission under the Great Seal, been nominated and appointed commissioners of deposit, to receive from the government of his most Christian Majesty at Paris the inscriptions to be delivered over to British commissioners in and by the several conventions thereinbefore mentioned; and that it was expedient to provide for the execution of the powers vested in the said several commissioners: It was enacted that, in order to enable the said commissioners of liquidation, arbitration and award to complete the examination and liquidation of the claims of such persons who should have caused their names and claims to be duly inserted in the said registers, it should be lawful for the said commissioners, and they were thereby authorized and empowered, subject to such deductions of two per cent. as therein mentioned, to apportion, divide and distribute the several sums of money stipulated by the said several conventions to be provided by France, and to order the same to be paid \*to and among the several claimants whose names were duly entered in the said registers; and, where such claimants should have been or should be adjudged to be entitled to payment in the whole or in part of their demands, to pay the sum adjudged to them in full, if the sums received and thereafter to be received for that purpose from the French government should be found sufficient for the payment in full of

(a) See p. 267, note (a).



all the claims which should be adjudged to be within the intent and meaning of the said several conventions, or any of them; or in part payment thereof in rateable proportions, if the said sums should be insufficient for the payment of such claims in full; and that such payment in full, or in part, and any rejection of any such claims as should by the said commissioners, on appeal to his majesty in council in manner thereafter mentioned, be adjudged not to be within the true meaning of the said conventions or any of them, should be respectively final and conclusive, and should be held to be in full and entire discharge of the French government and of his majesty's government from any demands in respect of any claims falling within the object and true intent, effect and meaning of the said conventions, or any of them, and which had been inserted in the said registers during any period allotted for that purpose by the several conventions. And by the said act it was further enacted, (sec. 16,) that, during the time that any capital inscribed in the great book of the public debt of France, in pursuance and for the purposes of the several conventions thereinbefore recited, or any part of such capital, should remain in the names of the said commissioners of deposit, and \*220] should not have been appropriated to the liquidation of any claims of his majesty's subjects under the said conventions or any of them, it should be lawful for the said commissioners of deposit, on receiving directions to such effect from his majesty's principal Secretary of State for Foreign Affairs, and from the Commissioners of his majesty's Treasury of the United Kingdom of Great Britain and Ireland, or any three of them, to sell and dispose of the whole or any part of such capital so inscribed in the said great book of the public debt of France, and so unappropriated, and to transfer the proceeds of such sale to England to the commissioners of liquidation, arbitration and award under that act, to be by them invested in Exchequer bills, or other public securities bearing interest, for the purpose of being applied to the payment or liquidation of any of such claims, or, in case all such claims should be paid or liquidated, for such other purposes as the said Commissioners of the Treasury for the time being, or any three of them, should direct the said commissioners of liquidation, arbitration and award to apply the same. And that all such Exchequer bills, or other public securities bearing interest, should be deposited in the hands of the Governor and Company of the Bank of England to the account of and in the names of the commissioners of liquidation, arbitration and award under that act, and should be and remain in the names of such commissioners for the time being, to be sold, and the produce thereof paid and applied for the purposes therein specified.

That, in the year 1819, as soon as the suppliant learned that the British commissioners had returned to London, and ascertained the spot at which they had \*221] established their office, he delivered to them a detailed schedule of his different claims. The petition then set



forth several communications between the suppliant and the commissioners, and stated that he was not aware that his name and claim had not been placed on the register at Paris until 1st of July, 1828, when it was ascertained that neither his name nor claim had been placed on the register of claimants until long after the passing of the said act of parliament.

The petition then set forth an award of the commissioners, dated 30th April, 1822, rejecting the claim, and stating the grounds of the rejection at full length.

“And your suppliant further sheweth that he is advised and believes that the said award is founded throughout upon erroneous views of the facts of your suppliant's case, as well as upon gross and absurd mistakes in point of law : amongst others,” &c. : then followed the objections, supported by a reference to other decisions of the commissioners.

That he appealed against the award of the commissioners, and, on 23d June, 1823, his appeal was heard before the Privy Council, which confirmed the award. That afterwards, on petition, the suppliant was heard before the Privy Council on the question whether they could rehear the appeal or send the case back to the commissioners : and the Council were of opinion that they had not the power of doing either, and gave their judgment accordingly, accompanied by a remark that the decision had been approved by his majesty in council, had been certified to the commissioners, and that, in consequence of that decision so certified, the funds had been actually divided amongst other claimants, and it was therefore clear there could be no redress. \*That, at the time of the giving of the last-mentioned judgment, upwards of one million sterling remained in the hands of the said commissioners, which fact appears by the accounts rendered by them. [222

Then followed objections to the grounds on which it was alleged that the commissioners had decided. The petition then stated that, after the rejection of the claim by the commissioners, and after the confirmation of the award of rejection by the Privy Council, the suppliant presented a memorial to the proper authorities in France, praying for compensation out of the fund provided in France for the indemnity of persons whose property had been confiscated on the ground of their emigration ; upon the face of which memorial it was stated that his claim was so made conditionally, with a view to meet the event of his not succeeding in his claim upon the British Government : but the claim was rejected by the French government on the express ground that all foreigners were excluded from the benefit of the law providing indemnity for emigrants, and that he was a British subject whose claims against France had been paid in the form of a compromise by the French government under the arrangement ratified and carried into effect by the convention of 1818.

The petition then stated proceedings before a committee appointed by the House of Commons to examine the claim, which, however, did not

report before the dissolution of parliament ; and further steps taken by the petitioner, but unsuccessfully, to obtain a recognition of his claim by the next House of Commons.

That, after payment of all the claims of the duly registered claimants which have been established, a large surplus remained in the hands of  
 \*223] the said \*commissioners of deposit, which surplus has since been paid to the Lords Commissioners of his late majesty's Treasury. That the suppliant had reasons (which he stated) for believing that one of the commissioners differed from the opinion of his colleagues ; that commissioner stating that he found the Duke de Richelieu acknowledged the receipt of the claim ; and that he (the commissioner) was of opinion that the presentation was valid, and not contrary to what the convention prescribed ; that it was not said in the convention that the claims must be presented exclusively through the British commissioners ; and that he found the register had been reopened to admit other claimants.

That attempts have been made, on the suppliant's behalf, to obtain inspection of the documents relating to his claim ; but that certain of these, which he described, were stated to him to be missing.

That, in the then last Trinity term, the suppliant moved the Court of Queen's Bench (a) for a rule calling upon the Lords Commissioners of the Treasury to show cause why a writ of mandamus should not issue, commanding them to pay to him the amount of the surplus paid by the commissioners of deposit, mentioned in stat. 59 G. 3, c. 31, to the Lords of the Treasury, or so much thereof as might be sufficient to indemnify the suppliant for the loss of immovable property in Lower Alsace unduly confiscated by the French authorities ; which motion was founded upon an affidavit made by the suppliant, wherein he stated in substance the whole or the greater part of the facts hereinbefore set forth. That, upon the motion, the suppliant's counsel drew the attention of the court to  
 \*224] those parts of the affidavit which showed \*that the funds paid by the French government under the several conventions of 1815 and 1818 were received by the crown in the capacity of trustee for such of its subjects as had been injured by French spoliation, and who came within the terms of those conventions, and the crown had entered into an implied engagement, both with the French government and the British subjects interested, that the funds should be distributed in accordance with those conventions ; and his counsel urged that, by the statute, the duty of duly administering these funds was removed from the crown and vested in the said commissioners in respect of the registered claimants, and in the Lords of the Treasury as to any surplus which might remain after the payment of the registered claimants ; and that all objections as to his nationality, not only as being a British subject, but as coming within the provision of the conventions, was not only unfounded in law and in fact, but had been abandoned by the French government at the

(a) *In re Baron De Bode*, 6 Dowl. P. C. 776.

time when that government was alone interested in diminishing the amount of claims, and long before the sum had been fixed which France should pay by way of final settlement of those claims. That the court refused to grant the rule, and by its written judgment assigned two grounds only for such refusal: the first of which grounds was that the claim was unproved and unliquidated, and that the suppliant could not call upon the depositaries of a gross fund to pay him thereout any portion till he had reduced his demand to a certainty, and that he could not call upon these depositaries to ascertain his claim, they having no power so to do, no power to hear, to inquire, to take proofs, or to determine; that, merely as such depositaries, they had none of these powers; and that no law or statute had \*invested them specially with such powers: and the second ground was, that the said Lords Commissioners held the fund as the servants of the crown, inasmuch as the money was first obtained by the exercise of the royal functions; that the suppliant's claim was beside the parliamentary appropriation of any part of that fund; and that the residue had now reverted to the crown, and was in the hands of the crown, by its servants; and that it was an established rule that a mandamus would not lie against the servants of the crown merely to enforce the satisfaction of claims upon the crown. [\*225]

That the suppliant is informed and believes he is entitled to relief by petition of right in respect of any claim which he may have upon the crown, and whether the same be of a liquidated or an unliquidated nature. That the value of immovable property in Lower Alsace, so lost by the suppliant, together with the interest payable thereon, according to the terms of the first-mentioned convention, amounted, on 1st January, 1819, to the sum of 13,320,885 francs, 10 sous and a half, of French money, being of the value of 532,835*l.* 8*s.* 4*d.* of English money; and the suppliant accordingly claimed that amount before the commissioners of arbitration, liquidation, and award.

“All and singular which matters, by your suppliant above in his petition alleged, your suppliant is ready to verify in such ways and manners as may be convenient.

“Your suppliant therefore most humbly prays that your majesty will be graciously pleased to order that right be done in this matter; and to endorse your royal declaration hereon to that effect, and to refer the petition, with such your royal order and declaration \*thereon, to your majesty's high Court of Chancery at Westminster; and that this petition may be duly received and enrolled; and that your majesty's Attorney-General, being attended with a copy thereof, may be required to answer the same; and that your suppliant may henceforth prosecute his complaint herein in such court, and take such other proceedings herein as may be necessary, against the said Attorney-General as representing the rights and interests of your majesty, and also against such other persons, if any, as need may require; and that, for that purpose, your suppliant may have [\*226]

leave to make such Attorney-General, and such other persons as aforesaid, parties hereto, and to pray to obtain such relief in the matters aforesaid as under the circumstances hereinbefore stated shall be just. And your suppliant, as in duty bound, shall ever pray," &c. "J. MANNING."

"Whitehall, December 10th, 1838.

"Her majesty is pleased to refer this petition to her high Court of Chancery, to consider thereof, and to do what is right and proper therein.

"2d February, 1839.

"J. RUSSELL."

"Let right be done.

"COTTENHAM, C."

"Whereupon the said Chancellor, by certain letters patent of the said lady the now queen, directed to (a) Martin John West, John Farquhar Fraser, Sutton Sharpe, John Elijah Blunt, Edward Vaughan Williams and Edward Smirke, Esquires, five, four, three or two of them, to inquire upon the oath of good and lawful men of the county of Middlesex, as well \*227] within liberties \*as without, by whom the truth might best be known, of all and singular the matters in the said petition specified and contained, the tenor of which letters patent follows in these words.

"Victoria, by the grace," &c., "to our faithful and beloved Martin John West, John Farquhar Fraser, Sutton Sharpe, John Elijah Blunt, Edward Vaughan Williams, and Edward Smirke, Esquires, barristers at law, greeting: Whereas, by a certain petition lately presented to us by our beloved and faithful subject Clement Joseph Philip Pen De Bode, Knight, Baron de Bode, and of the holy Roman Empire, we have been informed," &c. Here followed the statement of the petition *in totidem verbis*, only omitting the offer to verify the statement, and the prayer.

"We, willing that what is just in this behalf should be done, have assigned you or any five, four, three or two of you, by the oath of good and lawful men of the county of Middlesex, as well within liberties as without, by whom the truth of the matter may be best known, to inquire of the truth of all and singular the matters in the said petition contained and specified. And therefore we command you that, at such day and place, or days and places, as you, or any two or more of you, shall appoint for that purpose, you, or any two or more of you, diligently set about the premises, and do and execute all and singular the matters aforesaid with effect; so that as well the inquisition, as all other matters by you, or any two or more of you, taken and done in the premises, you, or any two or more of you, send and certify to us in our Chancery, under your seals or the seals of you, or any two or more of you, and the seals of those persons \*228] by whom such inquisition shall \*be made, distinctly and openly without delay, together with these our letters patent. We also give full power and authority to you, or any two or more of you, to call and procure to appear before you, or any two or more of you, all persons whomsoever fit to be examined in the premises, and their examinations, they having been first duly sworn before you, or any two or more of you,

(\*) *Sic*.

to receive and take. And we also, by the tenor of these presents, command our sheriff of our county of Middlesex that, at a certain day and place, or certain days and places, which you, or any two or more of you, shall appoint for that purpose, and on our part make known to him, he cause to come before you, or any two or more of you, so many and such good and lawful men of his bailiwick, as well within liberties as without, by whom the truth of the matter in the premises may be better known and inquired into. And we also, by the tenor of these presents, strictly command all and singular justices, mayors, sheriffs, bailiffs, officers, ministers, and all other our faithful subjects of our said county of Middlesex, as well within liberties as without, that to you, in the execution of these presents, they be attendant, obedient, aiding and assisting, in such manner as you, or any two or more of you, shall make known to them on our behalf. In witness whereof we have caused our letters patent to be made. Witness ourself at Westminster, the 23d of December, in the fourth year of our reign.

“By virtue of which letters patent the said John Farquhar Fraser, Edward Vaughan Williams, and Edward Smirke, returned a certain inquisition, before them taken, into the High Court of Chancery aforesaid, with the said letters patent thereto annexed, in these words :

\*“Middlesex, to wit. An inquisition taken at Westminster Hall, in the county of Middlesex, on Wednesday, the 15th June, in the year of our Lord, 1842, and, by adjournment, on Thursday, the 16th, and Friday the 17th, and Saturday the 18th days of the same month of June, before John Farquhar Fraser, Edward Vaughan Williams and Edward Smirke, Esquires, by virtue of certain letters patent to” M. J. West, &c., “directed, and to this inquisition annexed, on the oath of Richard Carpenter,” &c., “to wit, fourteen in all, good and lawful men of the county of Middlesex : who say, upon their oath :

“That Clement Joseph Philip Pen De Bode, the suppliant in the said letters patent mentioned, is the eldest son of the late Charles Frederick Lewis Augustus De Bode, Baron De Bode, and of the Holy Roman Empire, and formerly a colonel of the regiment of Nassau-Saarbruck, in the service of the King of France, by Mary, his late wife, daughter of the late Thomas Kynnersley, of Loxley Park, in the county of Stafford, Esquire ; and that the said suppliant’s said father was born on the family estate at Neuhof in Germany, and was baptized at Neuhof aforesaid ; and that the said suppliant was born in the said county of Stafford, in the year of our Lord 1777, and was baptized at Uttoxeter, in the same county, on the 2d day of May, in the same year.

“And that, both since the making of the peace of Westphalia, concluded between France and the Holy Roman Empire on the 24th day of October, in the year of our Lord 1648, and for many centuries before that time, the lordship and land of Sultz, otherwise called Sultz-am-Staaten, otherwise called Soultz-sous-Forêts, constituting part of the

\*230] barony of Fleckenstein, in the \*late province of Lower Alsace, now called the department of the Lower Rhine, in the kingdom of France, was an ancient fief descendible in the direct male line only, and not liable to be aliened or encumbered without consent of the grantor of the fief; and that in the year 1720, upon the failure of the male line of the barons of Fleckenstein, nomination to and investiture of the said fief was made and granted by the then Archbishop of Cologne to Hercules Meriadec Prince of Rohan Soubise; and that, upon the death of the last male descendant of the said Prince of Rohan Soubise, in 1786, it belonged to the then Archbishop of Cologne to appoint a new line of feudatories to the same fief. And that the said Charles Frederick Lewis Augustus, late Baron De Bode, obtained from him a nomination to the said fief and a grant thereof, and was invested by him with it as with a real male fief, by the description of the castle and town of Soultz, and the villages of Hermersweiler, Reschweiler, Meisenthal, Memelshofen, Jaegershofen, and Lausenscholt, together with the vassals, jurisdictions, woods, forests, chases, waters, fisheries, pasturage, franchises, commons, and every thing belonging thereto, without exception, in the same manner as the De Fleckensteins had possessed them and held them; also the right of high and low jurisdiction, and the profits arising therefrom: to hold to the said Baron De Bode and his legitimate male feudal heirs of his body, subject to certain feudal duties in the said grant particularly mentioned; and, among others, that the said Baron De Bode should not sell or assign, sever, or deteriorate the said fiefs, without the consent of the said Elector of Cologne; and that such grant was then formally ratified by the Chapter

\*231] of Cologne; and that investiture of the \*said fief was then in due form given by the officers of the said archbishop to the said late baron.

“ And, further, that, previously to the peace of Westphalia, the provinces of Upper and Lower Alsace formed part of the Empire of Germany. And, further, that the Emperor of Germany and the King of France, who had long been at war, were parties to the said peace of Westphalia. And, further, that, by the treaty of Munster, which treaty formed part of the peace of Westphalia, the Emperor of Germany, for himself and for the House of Austria and also the empire, ceded to France all the rights which they respectively had in Upper and Lower Alsace, with all jurisdiction and sovereignty, subject, however, to an express proviso that France should be bound to leave the Barons of Fleckenstein, and all the nobility of Lower Alsace, in the liberty and possession they had enjoyed heretofore, as immediately dependent upon the empire, so that the king should not claim any royal superiority over them, but should rest content with the rights which had belonged to the House of Austria, and which, by that treaty of pacification, were yielded to the crown of France, but without prejudice to the sovereignty acquired by France under that treaty in that which had belonged to the House of Austria.



“And, further, that, by the treaty of peace concluded at Nimeguen on the 3d day of February, 1679, between the empire and France, under the mediation and guarantee of the King of England, it was stipulated that the provisions of the said treaty of Munster should be and remain in as full force as if its provisions had been inserted, word for word, in the said treaty of Nimeguen; and that a similar ratification was included \*in the treaty made between the Kings of England and Spain on the 10th day of June, 1680. And, further, that, a new general league having been formed against France, in consequence of the violation of the treaties of Westphalia and Nimeguen, William the Third, King of England, joined it by an act dated Hampton Court, December the 20th, 1689. And, further, that a similar ratification of the said treaty of Munster was included in the treaty of Ryswick, made and concluded on the 30th day of October, 1697; and also in that of Utrecht, made on the 11th day of April, 1713; and in that of Aix la Chapelle, made on the 18th day of October, 1748; and in that of Paris, made on the 10th day of February, 1763; and in that of Versailles, made between the Kings of England and France on the 3d day of September, 1783. [\*232

“And, further, that in the year 1791 the said suppliant’s late father made a public cession of all his rights in the said property in the presence of the burghers and vassals of the said lordship of Sultz, to the said suppliant. And, further, that, as the said suppliant was only fourteen years of age at the time of the said cession, the said lordship and lands of Sultz were from thenceforward administered and governed in the name of the said suppliant, by his said late father.

“And that, in the beginning of October, 1793, the said suppliant and his father left their residence at Sultz and took refuge in the Austrian army, then in the neighbourhood. And, further, that, on the 10th day of October, 1793, by a decree now remaining in the archives of the said department of the Lower Rhine, it was decreed by the said department, in full session, that the individuals named in a list which was and is subjoined to \*the said decree should be declared emigrants, and that all their property should be confiscated in order to its being sold or aliened, agreeably to the provisions of the laws relating to emigrants: and that the list of names subjoined to the said decree was as follows; ‘*I, Armann N. N. deux frères Seltz,—Bode de Soultz;*’ after which followed other names. And, further, that, in pursuance of the said decree, the said lordship and lands of Sultz, including a certain mansion and certain houses, mines, lands, and other property forming part of the said lordship and lands, were seized as confiscated by the persons then exercising the powers of government in France, and were thenceforward treated as national property, and that part thereof was afterwards sold under the authority of the French government, and that the residue thereof continued in the possession of the French government until after the restoration of the House of Bourbon, in the years 1814 and 1815. [\*233

“ And, further, the suppliant's late father died in Russia, in the year 1797.

“ And, further, that, by the fourth additional article of the definitive treaty of peace between the Kings of Great Britain and France, concluded at Paris on the 30th day of May, 1814, it was stipulated that, immediately after the ratification of that treaty, the commissioners mentioned in the second additional article of the said treaty should undertake the examination of the claims of his Britannic majesty's subjects upon the French government for the value of the property, movable or immovable, unduly (indûment) confiscated by the French authorities, as also of the total or partial loss of the debts due to them, or other property unduly detained \*234] under sequestration, subsequently to the year \*1792. And, further, that, by the ninth article of the definitive treaty of peace between the Kings of Great Britain and France, signed at Paris, on the 20th day of November, 1815, it was stipulated that two conventions added to the said treaty should have the same force and effect as if inserted therein. And, further, that, in one of the said conventions, entitled Convention No. 7. between the Kings of Great Britain and France, also signed at Paris the 20th day of November, 1815, it was provided, Article 1, that the subjects of his Britannic majesty having claims against the French government, who, in contravention of the second article of the treaty of commerce of 1786, and subsequently to the 1st day of January, 1793, had suffered in consequence of confiscation or sequestration decreed in France, and their heirs and assigns, subjects of his Britannic majesty, should, conformably to the fourth additional article of the treaty of Paris, made at Paris in the year 1814, be indemnified and paid after their claims should have been recognised as legitimate, and the amount thereof should have been fixed, according to the forms and under the conditions thereafter expressed. And, further, that the fifth article of the said convention contains the regulation by which the amount of British claimants in respect of immovable property was to be ascertained. And, further, that, by the seventh article of the said convention, it was stipulated that the claims of the subjects of his Britannic majesty arising from the different laws made by the French government, or for mortgages upon property sequestered, seized, or sold by the said government, or any other claim whatsoever not comprised in the articles of the said convention preceding the said seventh article, and which \*235] would be \*admissible according to the terms of the fourth additional article of the treaty of Paris of 1814 and of that convention, should be liquidated and fixed. And that, by the ninth article of the said convention, a capital producing annually 3,500,000 francs, to be inscribed in the great book of the public debt of France, was provided as a guarantee for such claimants, with a proviso that, if that amount should prove insufficient, further sums should be furnished to the extent of the claims. And, further, that, by the twelfth article of the said convention, a period of three calendar months was allowed to claimants resident in

Europe to present their claims; and that the thirteenth and fourteenth articles of the said convention directed the mode in which the claims of British subjects against the French government should be examined. And, further, that, by the second article of the said treaty of commerce in 1786, it was declared that it had been agreed that, if at any time any misunderstanding, interruption of friendship, or rupture, should arise between the two crowns, the subjects of each party residing in the territories of the other should be allowed to continue their residence and their business without being in any manner disturbed, so long as they should conduct themselves peaceably and should do nothing contrary to the laws; and that, in case their conduct should render them suspected, and the respective governments should find themselves obliged to order them to withdraw themselves, there should be granted to them for that purpose a term of twelve months, to enable them to withdraw themselves with their effects and their property, as well such as may have been intrusted to individuals as to the public, it being fully understood that this indulgence would not \*be claimed by those who should conduct themselves [\*236 in a manner contrary to public order.

“And, further, that, by a commission under the Great Seal of Great Britain, bearing date the 27th day of December, 1815, Colin Alexander Mackenzie, George Lewis Newnham, George Hammond, David Richard Morier, and James Drummond, Esqrs., were nominated and appointed commissioners of liquidation, arbitration and deposit, for the purpose of carrying into effect, on the part of Great Britain, the provisions contained in the said convention.

“And, further, that, on the 12th day of January, 1816, being within the said period of three calendar months from the signing of the said convention, the said suppliant, being then in the Russian service, directed a memorial of his claims as a British subject, under the convention of 1815, to the Russian ambassador at Paris, Count Pozzo di Borgo, who had engaged to transmit the same to the Duke de Richelieu, then being prime minister to the King of France, and his minister for foreign affairs, to be forwarded by him to the mixed commission mentioned in the said convention, and composed of an equal number of English and French commissioners; which mixed commission had not then entered upon its duties or begun to sit, the English members of the commission not then having arrived in France. And, further, that on the 9th day of February, 1816, the said memorial was forwarded by the said Count Pozzo di Borgo to the said Duke de Richelieu, so being such minister. And, further, that the said Duke de Richelieu sent a letter to Count Pozzo di Borgo to be communicated to the said suppliant, stating therein that he considered the claim of the said \*suppliant as inadmissible under the said convention, [\*237 inasmuch as the said suppliant's father was a German. The said suppliant then presented a memorial to the said Duke de Richelieu, from whom, on the 29th day of March, 1816, the said suppliant received an

answer, formally certifying that he had received the said suppliant's claim on the 9th day of February, 1816.

“And, further, that, by a convention,” &c., (stating the convention of April 25th, 1818, for inscribing an annuity in the great book of the public debt of France, verbatim as at p. 217, *antè*, down to the words “March, 1818.”)

“And, further, that, by an act,” &c., “passed in the fifty-ninth year of the reign of King George the Third, to enable certain commissioners fully to carry into effect several conventions for liquidating claims of British subjects and others against the government of France, after reciting, amongst other things, the nominations and appointments of the said Colin Alexander Mackenzie,” &c., (the inquisition then set out the recitals and enactments of stat. 59 G. 3, s. 31, sects. 1 and 16, as stated in the petition, *antè*, pp. 217—220, down to the words “therein specified.”) “And that neither the said suppliant's name nor his claim had been placed on the register of the names of claimants until after the passing of the said act of parliament.

“And, further, that, after payment of all the claims of the duly registered claimants which have been established, a large surplus, to wit, the sum of 482,752*l.* 6*s.* 8*d.*, remained in the hands of the said commissioners of deposit; of which surplus a sum of 200,000*l.* and upwards was  
 \*238] applied to satisfy claims which had been tendered \*after the time limited by the ninth article of the convention of the 20th November, 1815, and not admitted until the authority of the Lords Commissioners of his majesty's Treasury was given for that purpose, on the 5th May, 1826; and the residue, that is to say, the sum of 200,000*l.* and upwards, was paid into the Bank of England on the government account, by direction of the Lords of his majesty's Treasury, in pursuance of the said act of the 59th year of the reign of King George the Third, chapter 31.

“And, further, that the value of the immovable property in Lower Alsace, so lost by the said suppliant, together with the interest payable thereon according to the terms of the said first-mentioned convention, amounted, on the 1st January, 1819, to the sum of 9,106,650 francs, being of the value of 364,266*l.* English money.

“In witness whereof, as well the said commissioners as the jurors aforesaid have to this inquisition set their hands and seals, at the place and on the day and year above mentioned, that is to say, this 18th day of June aforesaid.

“Whereupon Sir *Frederick Pollock*, Knight, Attorney-General of the lady the now queen, who for the said lady the queen now in this behalf prosecuteth, being asked by the court here if he has or knows or wishes to say any thing why the said suppliant should not have such relief in this behalf as aforesaid, prayed a day to imparle with the counsel of the said lady the queen until the 10th of November, A. D. 1842: and it was granted to him, &c.

“At which day, to wit, on the 10th of November, in the year last aforesaid, before the said lady the now \*queen in her said High Court of Chancery at Westminster aforesaid, came the said suppliant in his own person, and prayed relief as aforesaid. Whereupon the said Sir *F. P.*, Knight, her majesty’s Attorney-General, who for our lady the now queen prosecutes in this behalf, is again asked if he has or knows or wishes to say any thing why the said suppliant should not have such relief as aforesaid. Which said Sir *Frederick Pollock*, who for the said lady the now queen prosecutes, being present now in court in his own person, protesting that the said petition is not good and sufficient in law, says, for and on behalf of our said lady the queen, that the said several matters and things in the said petition, and also in the said inquisition (a) contained, specified, and set forth, are not, nor is any one of them, nor any part thereof, true in fact : and this he, the said Sir *F. P.*, Knight, so being such Attorney-General as aforesaid, who sues for our said lady the queen as aforesaid, prays, on behalf of our said lady the queen, may be inquired of by the country. [\*239]

“And, for a further plea on behalf of our said lady the queen, touching and concerning the matters of the said petition, the said Sir *Frederick Pollock*, Knight, so being such Attorney-General as aforesaid, and who sues for our said lady the queen as aforesaid, by leave of the court here for that purpose first had and obtained, according to the form of the statute in such case made and provided, says, on behalf of our said lady the queen, that the said several supposed causes of petition in the said petition, and also in the said inquisition, \*contained, specified, and set forth, did not, nor did any or either of them, accrue to the said suppliant within six years next before the presenting and exhibiting the said petition by the said suppliant to our said lady the queen : wherefore he, the said Sir *Frederick Pollock*, Knight, so being such Attorney-General as aforesaid, who sues for our said lady the queen as aforesaid, prays judgment for our said lady the queen, if the said suppliant ought to have or maintain his said petition for relief in that behalf against our said lady the queen. [\*240]

“And, for a further plea,” &c., (commencement as in the last preceding plea,) “that the said several supposed causes of petition in the said petition, and also in the said inquisition, contained, specified, and set forth, did not, nor did any or either of them, accrue to the said suppliant since the accession of our lady the queen to the crown and sovereignty of this realm : and this he, the said Sir *Frederick Pollock*, Knight, so being such Attorney-General as aforesaid, who sues for our said lady the queen as aforesaid, is ready to verify : therefore, he prays judgment for our said lady the queen, if the said suppliant ought to have or maintain his said petition for relief in that behalf against our said lady the queen.

“*H. Waddington*, for the Attorney-General.

“And the said suppliant protesting that the plea of the said Attorney

(a) See, post, p. 243, note (a), p. 267, note (a), and p. 275, note (a).



General by him first above pleaded, and the matters therein contained, are insufficient in law in this, to wit, that the same plea is multifarious, and that it puts in issue divers public treaties and conventions, alleged in the said petition, and found by the said inquisition, to have been entered into  
 \*241] between divers kings of Great Britain, predecessors and progenitors of our said lady the queen, and divers foreign princes and states, and also that the said Attorney-General has in and by the said first plea denied the existence of a certain act of parliament made and passed in the 59th year of the late King George the Third, to enable certain commissioners fully to carry into effect several conventions for liquidating claims of British subjects and others against the government of France, and has in and by his said first plea referred the alleged non-existence of the said act of parliament to the decision of a jury of the country, and that the said plea is in divers other respects informal and insufficient, for replication nevertheless, in this behalf, the said suppliant says that, inasmuch as the said Attorney-General has prayed that the truth of the said several matters and things may be inquired of by the country, the said suppliant doth the like.

“ And the said suppliant protesting that the plea of the said Attorney-General by him secondly above pleaded, and the matters therein contained, are insufficient in law in this, to wit, that the same are wholly inapplicable to a plea pleaded by way of traverse, or in confession and avoidance, of matters contained in an inquisition taken under a commission issued to inquire into the truth of matters alleged in a petition of right, for replication nevertheless, in this behalf, the said suppliant says that the several causes of petition in the said petition, and also in the said inquisition, contained, specified and set forth, did, and each of them did, accrue to the said suppliant within six years next before the presenting and exhibiting of the said petition by the said suppliant to our said lady the queen: and this the said suppliant prays may be inquired of by the  
 \*242] country. \*And the said Attorney-General, on behalf of the said lady the queen, doth the like.

“ And the said suppliant, protesting that the plea of the said Attorney-General by him thirdly above pleaded, and the matters therein contained, are insufficient in law, for replication nevertheless in this behalf, the said suppliant says that the several causes of petition in the said petition, and also in the said inquisition contained, did, and each of them did, accrue to the said suppliant since the accession of our said lady the queen to the crown and sovereignty of this realm: and this he, the said suppliant, also prays may be inquired of by the country. And the said Attorney-General, on behalf of the said lady the queen, doth the like. J. MANNING.

“ Therefore, to try the several issues above joined, the sheriff of Middlesex is commanded that he cause to come before our said lady the queen, on the 11th day of January, in the year of our Lord 1843, where-soever she shall then be in England, twelve good and lawful men of the



county of Middlesex, qualified as by law is required, by whom the truth of the matter may be better known, and who to the said suppliant are in no ways related, to recognise upon their oath the full truth of and concerning the premises aforesaid; because as well the said Sir *Frederick Pollock*, who prosecutes as aforesaid, as the said suppliant, have put themselves upon the said jury. The same day is given to the parties aforesaid."

The case was tried at bar, in Trinity vacation, 1846,(a) before Lord DENMAN, C. J., PATTESON, WILLIAMS, and COLERIDGE, Js.

\**Hill, Manning, Serjt., Mellor, G. A. Young, and Anstey*, appeared as counsel for the suppliant, and Sir *F. Thesiger*, Solicitor-General, *Erle* and *Waddington*, as counsel for the crown. [\*243]

Evidence was offered, on behalf of the suppliant, in support of the several findings in the inquisition.(b)

To prove that, after the cession, (which was not yet proved,) "the said lordship and lands of Sultz were from thenceforward administered and governed in the name of the said suppliant, by his said late father, (antè, p. 232,) evidence was offered that the father, at a time subsequent to the alleged cession, while administering and governing the lordship and lands, had declared that he did so for the suppliant.(c)

*Counsel for the Crown.* The declaration cannot be admitted. According to both the case for the suppliant and the evidence, the cession by the father to the son had taken place before the declaration was made: and, that being so, the father would not be making a declaration in abridgment of his *primâ facie* interest, which is the only supposition on which the declaration would become evidence. The declarations of a party acting as steward or bailiff cannot be evidence of the title.

*Counsel for the Suppliant, contra.* If it is to be assumed that there had been a complete and valid cession, the evidence is of course not wanted, because then the \*property could have been administered only for the son. But, this being disputed, and no evidence of it having [\*244] been yet given, the fact simply is, that the father was in apparent absolute possession, and, therefore, was *primâ facie* owner. His declaration, therefore, that he administered only for the son, falls within the common principle of admitting a declaration made in abridgment of the *primâ facie* right of the party declaring.(d)

*Per Curiam.* We cannot assume any state of things which is not yet in proof. We therefore have only the fact that the father was managing the property. - If, when so doing, he declared that he was acting as bailiff for another, that was an admission against his apparent interest, and therefore good evidence. Evidence admitted.

(a) June 20, 21, 22, and 24.

(b) A question arose, whether, upon the traverse, any facts were put in issue which appeared in the petition but were not found in the inquisition: but it became unnecessary to decide this. See p. 267, post, note (a).

(c) It was assumed, on both sides, that the father was dead at the time of the trial.

(d) See *Doc dem. Daniel v. Coulthred*, 7 A. & E. 235.

For the purpose of proving the value of the property, the suppliant's counsel proposed to put in certain depositions made by a party who was shown, to the satisfaction of the court, to be abroad and out of their jurisdiction. It appeared that, after the finding of the inquisition, and (as the counsel for the suppliant stated) under the apprehension that the crown would traverse the inquisition, the suppliant filed a bill against the Attorney-General, reciting the proceedings in the petition of right, to perpetuate evidence. The cause was entitled *The Baron De Bode* against *The Attorney-General*. The Attorney-General demurred; but the Court of Chancery (Sir L. SHADWELL, V. C.) overruled the demurrer; and the commission issued. The crown was applied to for the purpose of its joining \*245] in the \*commission, but did not join; and the depositions were taken ex parte. They were entitled in the cause in Chancery. The commission directed the commissioners to examine witnesses "upon certain interrogatories, to be exhibited to you on the part of Clement Joseph Philip Pen De Bode, Baron De Bode, complainant, against our Attorney-General, defendant."

*Counsel for the Crown.* This is a proceeding in a different cause, between different parties. The Vice-Chancellor had no power to make any documents evidence on the trial of this traverse.

*Counsel for the Suppliant, contra.* The depositions could not have been otherwise entitled. Then they become evidence as made in a proceeding springing out of the present one, and, in effect, between the same parties. An opportunity has been given to the crown to cross-examine the deponent.

LORD DENMAN, C. J. I am of opinion that the evidence ought to be admitted. The proceeding in Chancery must be taken as a proceeding in this cause: and this is, in fact, a commission to examine witnesses in which both the parties now before us might have concurred, and might have had a full opportunity of cross-examining.

PATTESON, J. As I understand the state of the case, there was, at the time this commission issued, no court except the Court of Chancery in possession of this cause. It would be, therefore, very hard if a commis- \*246] sion, which issued in the cause as it then stood, could \*not be read when the inquisition was afterwards traversed.

WILLIAMS, J., concurred.

COLERIDGE, J. I apprehend that the admissibility of this proof follows from what was said by the judges in the *Banbury Peerage Case* (a) in 1809. They were asked, "Whether depositions, taken in the court of Chancery, in consequence of a bill to perpetuate the testimony of witnesses, or otherwise, would be received in evidence to prove the facts sworn to, in the same way and to the same extent as if the same were sworn to at the trial of an ejectment by witnesses then produced?" They

(a) See 2 Selw. N. P. 756, 757, 10th ed. The case is cited (from a former edition) 1 Stark. Ev. 322, note (f), (ed. 3.)

answered: "Such depositions would not be received in evidence in a court of law, in any cause in which the parties were not the same as in the cause in the Court of Chancery, or did not claim under some or one of such parties." It was evidently implied that the depositions would be receivable when the parties were the same. Here they substantially are so: and, not only that, but the commission has issued in this very proceeding.

Evidence admitted.

Evidence was given for the suppliant to show the state of the law of inheritance in Alsace. A witness, called for the suppliant, and who stated himself to be a French advocate practising at Strasburg, in the department of Bas Rhin, stated, on cross-examination, that the feudal law had been put an end to in Alsace by the torrent of the French Revolution, de facto, in \*1789, and by the treaty of Luneville, de jure; and, upon being asked whether there was not a decree to that effect, he added, that there was such a decree, of the 4th of August, 1789, of the National Assembly; and that he had learned this in the course of his legal studies, it being part of the history of the law which he learned while studying the law. [\*247]

*Counsel for the Suppliant.* This evidence cannot be admitted, unless the decree itself be proved and put in. The answer offered would be a statement, not of the general principles of feudal or French Law, but of the contents of a particular decree. In *Clegg v. Levy*, 3 Campb. 166, a question arose whether a certain instrument in Surinam, relating to an alleged partnership in goods, required a stamp by the law of that place: and a witness, who had resided as a merchant at Surinam, stated "that in that colony all agreements must be stamped to be of any validity, and that there is a written law of the colony to this effect." Lord ELLENBOROUGH said: "I must have more distinct evidence of the law of Surinam upon this subject than the parol examination of a merchant. The law being in writing, an authenticated copy of it ought to be produced. Although this gentleman supposes that it applies to all agreements, it may possibly contain an exception, like our own stamp act, as to agreements for the sale of goods, wares, and merchandises. In the case of *Bohtlingk v. Inglis*, 3 East, 381, (a) respecting the right to stop in transitu in Russia, Lord KENYON required the written law of Russia upon this subject to be \*given in evidence. I will, therefore, admit this agreement to be read, unless you prove in the same way, that by the law of Surinam a stamp was requisite to give it validity." The same rule is laid down in 2 Phill. Ev. 144, ed. 9, where the cases just mentioned are cited, and also *Picton's Case*, 30 How. St. Tr. 225, 491; [Lord DENMAN, C. J., mentioned *Millar v. Heinrick*, 4 Campb. 155.] In *Middleton v. Janverin*, 2 Hag. Cons. R. 437, 442, the same general rule was admitted; but the case was distinguished on the ground that it was impossible then to procure the regular evidence of the foreign law. In

(a) See *Boehtlinck v. Schneider*, 3 Esp. 58; also note (a) to *Buchanan v. Rucker*, 1 Campb. 65

*Lacon v. Higgins*, 3 Stark. N. P. C. 178, the rule was complied with. There a witness, the French vice-consul, proved that at the Royal Printing Office in France laws were printed by the authority of the French government; and a book purporting to be so printed, upon which the witness was in the habit of acting, was received as evidence of the contents of the French Code. It is not necessary to inquire what would be the rule if the question arose on the law as resulting from a large number of written laws; here the answer points to a specific law. Nor does it make any difference that the evidence is offered on cross-examination; for the cross-examination is addressed, not to the correction of evidence given in chief, but to the introduction of a distinct and new fact. This evidence is not offered as secondary evidence admissible on account of any difficulty in procuring primary evidence, but as the primary evidence itself. It is as if the original decree were shown to be now in court, and yet oral evidence were offered.

\*249] *Counsel for the Crown*, *contra*. The witness is competent to speak to the law of France; and it is not necessary that he should produce the original sources for which he has drawn his knowledge. If an English lawyer, in a court where a question arose upon English law as a fact, were asked how many witnesses were necessary to the attestation of a devise of real property, he surely might, consistently with the English principles of evidence, answer that three witnesses were necessary from 1676 to 1838, and since then two only, without producing the statutes 29 C. 2, c. 3, and 7 W. 4, & 1 Vict. c. 26. The same rule must apply to evidence of law as to evidence of the facts of any other science. Now a medical man may state the result of his knowledge as to medical questions, though, in numerous instances, such knowledge must result from experiments or cases which he knows only by reading or report. So a chemist may speak of facts established by experiments which he has not witnessed. Here, especially, the witness, having shown, in his examination in chief, the law as it existed during a certain time, may surely be asked, on cross-examination, whether that state of law exists still. No inquiry is made as to the terms of the particular law: the question is how the law has been since a time named. In *Clegg v. Levy*, 3 Campb. 166, the evidence was given by a merchant, not by a lawyer. *Middleton v. Janverin*, 2 Hag. Cons. Rep. 437, 442, at any rate shows that there is no such peremptory rule as that contended for on the other side: there the effect of a decree of the council of Trent was collected by advocates from books. So, in questions upon the law of  
 \*250] tithes, the effect of the decree of the council of Lateran is always assumed, without producing the decree.

*Counsel for the Suppliant*, in reply. The contents of a written law must be proved exactly as the contents of a treaty: and it will not be contended that a treaty can be proved otherwise than by producing it, or accounting for the non-production and giving proper secondary evidence.

The illustrations suggested from the sciences of medicine and chemistry are in favour of the suppliant. If a medical or chemical witness were asked whether a particular fact were determined by a particular experiment made on a day named by a person named, the question could not be legally answered unless the witness had seen the experiment. On an issue as to the originality of an invention, in a patent case, could the originality be impeached by producing a scientific witness who had heard that the process in question had been performed before? The best evidence must be produced in every instance.

LORD DENMAN, C. J. The witness, upon being questioned as to the state of law in France in 1789, refers to a decree of that date. The form of the question is, I think, immaterial: in effect, the witness is asked to speak to the decree. It is objected that this is a violation of the general principle, that the contents of a written instrument can be shown only by producing the instrument or accounting for the non-production. But there is another general rule: that the opinions of persons of science must be received as to the facts of their science. That rule applies to the evidence of legal men: and I think it is not confined to \*unwritten law, but extends also to the written laws which such men are bound to know. Properly speaking, the nature of such evidence is, not to set forth the contents of the written law, but its effect and the state of law resulting from it. The mere contents, indeed, might often mislead persons not familiar with the particular system of law: the witness is called upon to state what law does result from the instrument. I do not think that the case of treaties is applicable: there no class of persons are so peculiarly conversant with the subject matter as to invest it with the character of a science. The cases which have been cited raise much less doubt in my mind than the opinion of one of my learned Brothers, who differs from me. In *Boehtlinck v. Schneider*, 3 Esp. 58, Lord KENYON, according to the report, declined to receive proof of the unwritten law of Russia from "a person conversant with the law of that country:" and asked, Can the laws of a foreign country be proved by a person picked up in the street? And he added, "I shall expect it to be made out to me, not by such loose evidence, but by proof from the country, whose laws you propose to give in evidence, properly authenticated." The question is, What is such evidence? And I think the decision can hardly be justified except upon the supposition that the person produced was not scientifically conversant with the law of Russia. I think much stress cannot be laid upon *Clegg v. Levy*, 3 Campb. 166. It was a question as to a foreign stamp law: and in England we require the necessity of a stamp to be very strictly shown before we exclude a document as insufficiently stamped. It must, however, be allowed that \*Lord ELLENBOROUGH's language goes very far. The marginal note of *Millar v. Heinrick*, 4 Campb. 155, is: "The written laws of a foreign state can only be proved by copies properly authenticated." The decision itself is

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perfectly right, but inapplicable to the present question. The action was for seaman's wages, earned on board a Russian ship; the defence rested on certain alleged written regulations of the Russian marine, which were expressly incorporated in articles signed by the plaintiff: and the attempt was to prove these regulations by oral evidence. That was properly rejected. It is true that Chief Justice GIBBS said: "That will not do. Foreign laws not written, are to be proved by the parol examination of witnesses of competent skill. But where they are in writing, a copy properly authenticated must be produced." That language certainly was much wider than the case required: the regulations were not the subject of general law, and, on that ground, ought to have been produced. In *Lacon v. Higgins*, 3 Stark. N. P. C. 178, the question was, whether a particular copy of the Code Napoleon might be produced in evidence. The copy purported to have been printed at an office which the French vice-consul proved to be the authorized office for printing the laws of France; it contained a commentary for the use of students: and he stated that he acted upon it in his own office. The evidence was admitted by Lord TENTERDEN: and I must say that this appears to me a very strong authority in favour of admitting the evidence now in question. There was no proof that the book was an actual authenticated, examined copy: it was merely a book handed by somebody to the vice-consul, and acted upon by him.

\*253] That evidence appears to \*me open to all the objections which can be urged in the present case: indeed, upon numerous occasions, if a different rule were adopted, there would be very great difficulty in establishing any law: and this might often produce the greatest injustice to individuals, who have, I think, a right when they can find, in the country where they are put to a trial, a person skilled in the law of another country which is brought into question, to rely upon the knowledge and opinion of a person so skilled. We are not without other authorities to the same effect. In *Picton's Case*, 30 How. St. Tr. 225, 491, a similar question came under discussion. And Lord ELLENBOROUGH said: "The text writers furnish us with their statement of the law, and that would certainly be good evidence upon the same principle which renders histories admissible." He stated a case in which the History of the Turkish Empire by Cantemir was, after some discussion, received by the House of Lords: and he added that he should receive any book which purported to be a history of the common law of Spain. I do not know whether by the term "common law" any distinction was implied between the written and unwritten law of Spain; but I think the same principle applies. A person states that the law is in a book: and, a witness having said that such book is considered of authority, it is received at once as evidence of the law upon the point in question. In *Middleton v. Janverin*, 2 Hag. Cons. R. 437, 442, Sir William Wynne allowed evidence of a similar description to be given of a decree of the Council of Trent. It is true that what was produced purported to be a copy of the law: but there was



no evidence that it was such a copy. There was \*nothing more than the degree of credit given to an historian who would naturally be led to state the law, or to a text writer connecting his opinion with it. The general principle seems to me to be as applicable to the case before us as to that case. But, I confess, I look at this question in a more important and general point of view, which has been suggested by my brother COLERIDGE. In questions of foreign law, books of the highest authority must frequently be resorted to: Pothier's works, for instance, as to the law of France upon contracts, bills of exchange, policies of insurance, and so on. Now, when Pothier states the law of France, as rising out of an ordonnance made in a particular year, can we exclude that, as being merely his account of the contents of a written instrument? When once we have been told, as we should be by competent persons in any part of the civilized world, that Pothier's works were of high authority, to what extent should we be going if we refused to receive them because Pothier does not confine himself to the unwritten law! I cannot conceive that, in any civilized country, a statement from Blackstone's Commentaries would be rejected, which set forth what the law was when altered, and up to what time continued. Such a statement would not relate merely to the contents of the statutes referred to, but to the state of the law before or after the time of its passing. I therefore give to the statement of the law by this gentleman, an advocate of the French bar, the same credit which I should give to a book which he stated to be of high authority. I find no authority opposed to this view, except that of some dicta which appear to me more strongly expressed than was required by the cases in which they occur: and some decisions which I \*do find appear to me, in principle, to go quite as far as is required to sanction the admission of this evidence; for I can perceive no distinction between proof from a copy of the law, as we find it tendered and received, and the proof now tendered. [\*254

PATTESON, J. I am very sorry that I differ from my learned brothers upon this question: but, looking at it as fully as I can, I have come to the conclusion that the evidence ought not to be received; and it is my duty to state, as I will do shortly, the grounds upon which my opinion rests. I am far from wishing to trench upon the rule that witnesses who, in any matter of skill, are called upon to give their opinion are to be fully received. But I do not consider this to be a matter of opinion. It appears to me to be a question as to the contents of a particular document: and it seems to me that those contents ought not to be received from the mouth of a witness, unless some reason is given for the non-production of that document, or an authenticated copy of it. I quite agree that a witness, conversant with the law of a foreign country, may be asked what, in his opinion, the law of that country is. But I cannot help thinking that, as soon as it appears that he is going to speak of a written law, his mouth is closed. By the written law, I do not now mean what may be found in a

text-writer, or in the judgment of a court in any particular case, but, that which I understand to be referred to in the present case, a decree of the supreme power of the state creating a law in the first instance. The rule would, I think, be very different in the two cases. It is not here attempted

\*256] to show that there has been any unsuccessful \*endeavour to obtain the law or an authentic copy of it: the evidence is offered as primary evidence. It is contended that an advocate of a foreign country may speak to the written law of that country. I do not mean to say that there is any distinction between a law made yesterday and one made a hundred years ago. In either case, as soon as it appears to be a written law, the witness's mouth is closed. The modes of proof may, indeed, differ in the two cases; proof in one case may be more difficult than in another: but we are now speaking only of the oral evidence which is to be received from a witness. The general rule is not denied: that, when the contents of a written instrument are to be proved, the instrument itself should be produced, or when the instrument from its nature is provable by an examined copy, then such examined copy. I cannot see why the rule should not be the same in the case of a written foreign law. It is very true that this court, on reading the words of a French law, may, at first, be liable to be misled as to the result from not being conversant with the general French law; but, supposing such a difficulty to arise, there would be no objection to our taking from French lawyers, as witnesses, the interpretation put upon the written law in question by the French courts. The question, here, is as to the mode of proving the written law in the first instance, before such a difficulty arises. Unless, therefore, some authority can be shown for the reception of this evidence, I think the general rule must be followed, and the evidence be rejected. Now the authorities cited against the reception of the evidence certainly do not go the whole length of establishing the objection: I think they are

\*257] open to the observations made by my lord. In *\*Clegg v. Levy*, 3 Campb. 166, the witness called was not a professional lawyer, but only a merchant; though Lord ELLENBOROUGH did say that the law ought to be proved by a copy. In *Millar v. Heinrick*, 4 Campb. 155, the decision might have been put on the ground that the regulations of the Russian marine, having been incorporated with the contract, formed a part of it: still Lord Chief Justice GIBBS did, in fact, lay the rule down broadly. In *Lacon v. Higgins*, 3 Stark. N. P. C. 178, the witness who deposed as to the book was not a French lawyer; and none such appears to have been in court. Lord TENTERDEN doubted very much whether he could receive the evidence. He did, however, receive it on the authority of *Picton's Case*, 30 How. St. Tr. 225, 491. I take it that he could not have received the book as evidence of the law of France, but only as a copy of the written law, which was set out in it verbatim. The court thus had the very words of the law before it. Whether, if an advocate had been called to state the effect of the law, his evidence would have

been received or rejected, the case does not show : but, if such evidence was admissible, it seems strange that it was not produced, and that the question as to the authenticity of a copy of the law should have been raised. *Middleton v. Janverin*, 2 Hag. Cons. R. 437, 442, appears to me not to be an authority in favour of admitting this evidence. There written evidence was received, containing the opinion of learned advocates of the country from which the question came ; and the judgment points out that the advocates actually copied the parts of the written law and ordinances on which they relied ; and the laws were then said by Sir [\*258  
 \*W. Wynne to be authenticated. Whether it was right or wrong to receive such copies as evidence of the written laws, is not the question ; the evidence was at all events different from that which is tendered to us here, oral evidence of the contents of a document. I entirely agree with the passage from Story's Commentaries on the Conflict of Laws, p. 530, ch. xvii. ss. 641, 642, cited by Mr. Phillipps, (Ev. vol. ii. p. 148, 9th ed.) "In general foreign laws are required to be verified by the sanction of an oath, unless they can be verified by some other such high authority as the law respects, not less than the oath of an individual. The usual modes of authenticating foreign laws (as of foreign judgments) are by an exemplification of a copy under the great seal of a state ; or by a copy proved to be a true copy ; or by the certificate of an officer authorized by law, which certificate must itself be duly authenticated. But foreign unwritten laws, customs, and usages, may be proved, and indeed must ordinarily be proved by parol evidence. The usual course is to make such proof by the testimony of competent witnesses, instructed in the law under oath. Sometimes, however, certificates of persons in high authority have been allowed as evidence." He does not seem at all to contemplate proof of the written law by the same mode as that by which the unwritten law is to be proved, but assumes it as quite clear that the written law must be proved by a copy authenticated in some way or other. The analogy suggested respecting treaties appears to me not to be perfect. As at present advised, I do not think that a treaty between two foreign nations, to which this nation is not a party, stands exactly upon the same footing as [\*259  
 \*the written law of a particular state. Nor do I mean to say that, where a witness has not stated that there is a direct written law containing that to which he is about to speak, he may not, being an advocate of a foreign country, be asked what the law of that country is : that is a doctrine which I do not mean to impugn. But I conceive that, the moment it appears that the law is written, his mouth is closed, and we must have the law itself or a copy of it. I do not wish to confine what I say to this particular instance of a law which passed fifty or sixty years ago : I think the rule would be just the same if the question related to the French code as existing at this moment. If a witness were asked what the law now is with respect to a bill of exchange in France, and were immediately cross-examined as to whether that law was not in writing, and answered

that it was, I think a copy of the law must be produced. I much doubt whether I have taken a right view, inasmuch as I differ from the rest of the court. But, so far as I have been able to consider the point, I think this evidence ought not to be received.

WILLIAMS, J. I entirely agree with the opinion which my lord and my brother COLERIDGE have formed on this point: and I think that the opinion of my brother PATTESON is the only real authority on the other side; for his own remarks upon the cases cited show that they do not decide the question. If we could apply the general test referred to by Mr. *Hill*, that the best evidence must be given to prove a fact, there could certainly be no doubt whatsoever: but we have here to decide in a case where the law recognises, as admissible, evidence which would not be admissible  
 \*260] in other cases. \*It is conceded fully by my brother PATTESON, of course, that, if an advocate belonging to a foreign country be called to prove the law of that country, any statement which he may make of law will be admissible, though it appear that he has taken it from a text-writer. But I understand that a distinction is raised as to the conclusiveness of the particular evidence. Why, upon what does this kind of evidence depend at all? We hear, in limine, that foreign law is to be proved as a fact. What does that mean? Is it a fact in the ordinary acceptation of the word, as it is a fact that a man was seen walking in a field or riding away with a horse? It clearly means, as applicable to this subject, the result which has been produced on the mind of a scientific person by his reading and intelligence in respect of the particular subject. There is, in this, little analogy to the proof of facts ordinarily so called. Then, if the opinion of an advocate is to be asked, how is he to become learned? Either by reading, or by practice, or by both. We need not inquire what the practice might effect, independently of reading. But what is he to read? Only text-books? Only writings of a particular kind? What precise kind of reading is to be excluded? If this learned gentleman had cited Puffendorff or Grotius, as the foundation of his opinion, it would not surely have been required that those books should be brought into court: yet the books themselves would, of course, show the truth as to their contents more directly than the learned advocate's version of them. Thus it is conceded that a fact of this sort is to be proved by evidence altogether inapplicable to facts in the ordinary sense of the word. Therefore, the only question is, where you are to stop: that  
 \*261] is really the single difficulty in the \*case. If we are to understand my brother PATTESON as expressing a doubt whether the state of law in France in 1789 was a fact, in the sense in which I have explained the term, to be learned from the opinion of the advocate, I should, with very great deference, differ from him. The lawyer comes to depose, not solely as to the law to-day or yesterday, but as to all that his knowledge of the law may teach him, which may include the state of the law two hundred years ago as well as the state of it four or five years ago.

The only question arising here is, "Did the feudal law exist in Alsace in 1789?" "No." "How so?" "It was abolished." Well; is not that the opinion of a lawyer on a point affecting the law of the foreign country? Then comes the question, "If abolished, how?" "By a decree of the legislature in 1789." It seems to me that the receiving evidence at all from the witness on this subject implies that you must receive from him all the information he can give, from whatever source derived. The decree is just as much a portion of his knowledge as a knowledge of the Statute of Frauds, or the different statutes of Wills, is a portion of the knowledge of an English lawyer, to which credit would be given in foreign courts. When my brother PATTESON adverts to the necessity of giving some kind of proof before you let in the decree, in order to see what it is in the decree upon which the advocate founds his knowledge, I own this strikes me as not an unimportant difficulty in the way of my learned brother's own opinion. Where are you to search? For what are you to search? What knowledge have we of the place of deposit from which we are to have the primary evidence, using that word in analogy to the use of it in our courts? We have no such knowledge: and yet, if the ordinary rule as to primary evidence is to be ap- [\*262  
plied here, writing does not help it. My learned brother, and the counsel for the claimant, appeared to think that, to a certain extent, a writing would aid the defect. But how so? That occurs only where the writing is an examined copy of the authentic document, which is the best evidence where it can be produced. Any other writing is good for nothing. It seems to me that the impossibility of our knowing where to search, what search to make, what is the best document, what, in its absence, is a proper examined copy, furnishes strong reason for holding that, where the question has been fairly put to a skilful man, and he gives his opinion that the law was so and so up to a given time, and then his ground for being of opinion that at such time the law was changed, the document, whatever it be, which supplies that ground, may be referred to by him as the foundation of his opinion. It seems to me, therefore, that, upon the principles applicable to this particular species of evidence, clearly admitted in the course of this discussion at the bar and on the bench, the evidence in question is admissible.

COLERIDGE, J. I agree entirely with my Lord and my brother WILLIAMS: and I should certainly have expressed my opinion without any hesitation, if it were not for that expressed by my brother PATTESON. Except for that authority, and, I should perhaps add, for the great importance (and in some respects novelty) of this question, I should have much preferred abstaining from fatiguing the court with my reasons. Under the present circumstances, however, I feel it right to give them, and shall do so as briefly as possible. In the \*first place, I think it important to [\*263  
point out the exact state of the evidence which we have to consider. My note is this: "That the feudal law as to this matter ceased.



in Alsace, de facto, by the revolutionary torrent in 1789 ; of right it only ceased at a later period, upon the treaty of Luneville ; on the 4th of August, 1789, there was a decree of the ruling power, the National Assembly, abolishing feudal rights ; it has been published ; I have become acquainted with it in the course of my general studies in the law." Upon that the objection arose : and this I state, not to evade the pressure of the argument of my brother PATTESON, but because I think it material to look at all the circumstances under which the evidence was tendered. The question is, substantially, how, according to our rules of evidence, we are to arrive at the knowledge of the law as arising from a foreign written law. We acquire a knowledge of written law in general as a fact, but a fact, as my brother WILLIAMS has stated, of a particular kind, a fact which can be arrived at only as a matter of science, and not as a matter of mere practice. I take it nobody can doubt that a lawyer, who, without ever having held a brief or practised out of his chambers, had acquired all his knowledge by reading, would be as competent to give evidence respecting the state of the English law as if he had been engaged in the most extensive practice. What then do we mean by a knowledge of the law ? That question seems to me to go to the foundation of the whole matter ; and it must be determined, with reference to the particular question before us, by a little subdivision. We must inquire, first, as to the sources of our knowledge, and, secondly, as to the time over which we are to range for

\*264] our knowledge. Now, with regard to the sources of the knowledge, we are to find it partly in the actual documents, the writings at first existing as laws, the actual parliamentary rolls in this country, the arrêts or decrees (being found in proper custody) in other countries : that is one source. Where these have been lost or have never existed, the knowledge of the law (independently of what is got by practice, which I put out of the question in the case of a document) must be got from text books, reported decisions, records and local customs prevailing in particular districts. First, with regard to the last class. It is, I think, conceded that, though the witness should state that all his knowledge is derived from reading a particular book or a particular decision, he still might give us the result of all his knowledge of the state of the unwritten law. That being so, I cannot, independently of authority, understand why he may not equally give the result of his knowledge as to the law where the original writings still exist. Then, next, as to the time over which our knowledge is to range. When we talk of a man having a knowledge of the law, do we mean a knowledge of the law only as it exists in the courts of justice at the present day, or do we mean that knowledge of the law and the changes it has undergone, which he has acquired in the course of the study that gives him the character of a scientific witness. I apprehend we clearly mean the latter. Suppose the witness had been alive in 1789, and had said here, upon cross-examination, "the law of France was so and so, up to a particular day ; and



after that it was so and so:" and he were then asked, "how do you know there was any such difference;" and were to answer, "because on that day the law \*was changed by a decree of the National As- [\*265  
sembly of France:" could it be said that, the moment the witness proposed to speak of a particular decree which had made a change in the law, his evidence was to be excluded? In the absence of authority, I can understand no principle on which such a distinction can exist. It is said, and this is the point to which my brother PARTSON has addressed his argument almost exclusively, that, in deciding according to the view which I take, we break through a great and fundamental rule of evidence, and are getting by oral testimony at the contents of a written instrument without accounting for its non-production. There appears to me to be a fallacy in that. The general principle does not seem to me to apply in this case. What in truth is it that we ask the witness? Not to tell us what the written law states, but, generally, what the law is. The question is not as to the language of the written law. For, when that language is before us, we have no means by which we are to construe it. Let me put this case. Suppose a gentleman who, like the vice-consul in *Lacon v. Higgins*, 3 Stark. N. P. C. 178, (a case which I think admits the distinction I shall presently point out,) was not professionally connected with the law, should tell us, "I went to the proper office, and made an examined copy of this section of the Code Napoléon; and here it is." Would that be evidence for this court what the law of France is? In point of authority, I apprehend it would not be so: certainly it would not be so in point of convenience; for, after all, if we were to attempt extrajudicially to expound that law, we should be liable to the most serious errors. The question for us is, not what the \*language of the [\*266  
written law is, but what the law is altogether, as shown by exposition, interpretation and adjudication. How many errors might result if a foreign court attempted to collect the law from the language of some of our statutes which declare instruments in particular cases to be "null and void to all intents and purposes," while an English lawyer would state that they were good against the grantor, and that the courts have so expounded the statutes! It is no answer to say that other evidence by word of mouth may be added for the purpose of giving the interpretation of the written law. I am merely showing that our courts require, not the actual written words of a foreign law, but the law itself; for which purpose a professional witness is required to expound it. Now suppose a copy of the Code Napoléon to be regularly proved before us, some provisions of which has received an exposition in the French courts analogous to that which I have been suggesting in the case of English statutes. The French lawyer would tell us, "that is indeed the language of the Code Napoléon, but I, as a lawyer, tell you that the legal meaning of it is so and so." Upon being asked how he arrived at that result, he would answer, "because I have read such and such books on the subject, and the reports of

such and such cases, and have heard such and such decisions." It is clear that he might give all this part of the evidence without producing the written authority: and I cannot understand why, if all such documents and books might be orally deposed to because they constituted only the sources from which he derives his opinion, and because we learn the law not from those sources but from that opinion, a distinction is to be made according to which \*we are to reject oral evidence of another source of his opinion, namely, the written decree. So I conceive the question to stand, upon principle merely. As to the authorities, all I shall say is that I agree entirely with what has been said by my brother PATTESON. There is opinion on one side and opinion on the other, but nothing which can be said to be a decision precluding us from admitting the evidence. Upon these grounds, it seems to me that it ought to be admitted. Evidence admitted.

The jury found for the suppliant on the first issue, and for the crown on the others.

The verdict was entered as follows, immediately after the venire at p. 242.

"At which day, before our lady the queen, at Westminster, come as well the suppliant by his attorney aforesaid as the said Attorney-General in his own person. And the jurors of that jury, being summoned, also come; who, to speak the truth of the premises being chosen, tried and sworn,

"As to the first issue joined between the parties, say, upon their oath, that the several matters and things in the said inquisition (a) contained, specified and set forth are true in fact.

And, as to the second issue joined between the said parties, the jurors aforesaid, upon their oath aforesaid, \*say that the several causes of petition in the said inquisition contained, specified and set forth did not, nor did any or either of them, accrue to the said suppliant within six years next before the presenting and exhibiting of the said petition by the said suppliant to our said lady the queen.

"And, as to the issue thirdly joined between the said parties, the jurors aforesaid, upon their oath aforesaid, say that the said several causes of petition in the said inquisition contained, specified and set forth did not, nor did any or either of them, accrue to the said suppliant since the accession of our said lady the queen to the crown and sovereignty of this realm."

In Michaelmas term, 1844, *Hill* obtained the following rule:

(a) The jury expressly negatived the allegation, contained in the petition (p. 217, *antè*) but not in the inquisition, that the French government had granted a sum specifically in respect of the suppliant's claim: and a question arose whether, on the particular form of the traverse taken by the crown, the verdict ought not to negative so much of the petition as was not proved. This, however, it became unnecessary to decide. See p. 275, *post*, and (a) *ibid*

“ Wednesday, the 13th day of November, in the eighth year of the reign of Queen Victoria.

“ In the Queen’s Bench.

“ England, Middlesex.

• The Queen and Clement Joseph Philip Pen De Bode, Baron De Bode. } It is ordered that the first day of the next term be given to her majesty’s Attorney-General to show cause why the verdict in this cause should not be entered on the record for the suppliant on the first issue ; and why judgment should not be entered for the suppliant, notwithstanding the verdict found for the crown on the second and third issues.

“ Upon notice of this rule to be given to the solicitor for the affairs of her majesty’s treasury in the mean time.

“ On the motion of Mr. *Hill*,

“ BY THE COURT.”

• In the same term, Sir *F. Thesiger*, Solicitor-General, obtained the following rule : [\*269

“ Wednesday, the 13th day of November, in the eighth year of the reign of Queen Victoria.

“ In the Queen’s Bench.

“ England, Middlesex.

- Clement Joseph Philip Pen De Bode, Baron De Bode, suppliant, against the Queen, defendant. } It is ordered, that the first day of the next term be given to the suppliant to show cause why judgment should not be entered in this prosecution for the defendant on the first issue, non obstante veredicto for the said suppliant on part of the said issue. Upon notice of this rule to be given to the attorney or agent for the said suppliant in the mean time.

“ On the motion of Mr. Solicitor-General,

“ BY THE COURT.”

In Hilary term and vacation, 1845, (a)

*Hill*, *Manning*, Serjt., *Mellor*, *G. A. Young*, and *Anstey*, showed cause against the Solicitor-General’s rule : and

Sir *F. Thesiger*, Solicitor-General, *Kelly*, and *Waddington*, supported the rule.

In the same Hilary vacation the court directed the counsel for the suppliant to argue in support of *Hill*’s rule : and, accordingly, (b)

• *Hill*, *Manning*, Serjt., *Mellor*, *G. A. Young*, and *Anstey*, were heard in support of that rule. [\*270

The court took time to consider whether the counsel for the crown should be called upon. (c) *Cur. adv. vult.*

(a) January 27th and 28th, and February 10th. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

(b) February 11th and 12th. Before the same judges.

(c) It is considered sufficient to report the judgment of the court, and to refer to the notes for some of the authorities cited.

Lord DENMAN, C. J., in this vacation, (December 11th,) delivered the judgment of the court.

The general proposition maintained by the suppliant is, that the conventions concluded between England and France, and the proceedings and transactions that have followed, have produced this state of things. The money paid into the bank on the government account has been virtually received by the crown in trust for and to the use of the suppliant; that money was in effect provided for the purpose of paying him a compensation for the property which he lost at the period of the French Revolution; he falls as completely within the description of the person to whom that money is now made payable as if the treaty had named him as that person, and had lodged the money in the hands of the crown of England for the express purpose of being paid over to him.

On the part of the crown, while this deduction of facts is questioned in all its parts, long and able arguments have been strenuously urged to prove that, supposing all the facts to be well established by evidence and well found by the verdict, still no judgment can be given for the suppliant in this form of proceeding. The petition of right is said to be maintainable  
 \*271] for no other \*objects than land, or specific chattels, certainly not for a sum of money claimed either as debt or by way of damages. (a)

(a) The following are some of the authorities mentioned on this question, which led to a general inquiry into the nature of a writ of right, and the proper course of the proceeding, as to both substance and form.

Yearb. Tr. 34 H. 6, fol. 50 B. pl. 18; 3 Fitz. Abr. 6 b, (ed. 1565,) *Petition*, pl. 8; *Ashby v. White*, 2 Ld. Raym. 938, 953; *Case of Cives Eborum*, Ryley's Pl. Parl. 252, (33 Ed. 1;) S. C. 1 Rot. Parl. 165, No. 56; *The Case of the Bankers*, 14 How. St. Tr. 1, 48; *Case of Bishop de Sallowe*, Ryley's Pl. Parl. 408, (14 Ed. 2;) S. C. 1 Rot. Parl. 374, No. 30; *Case of Warden*, Ryley's Pl. Parl. 262, (33 Ed. 1;) S. C. 1 Rot. Parl. 170, No. 95; *Macbeath v. Haldimand*, 1 T. R. 172; 2 Br. Abr. 131 a, *Petition*, pl. 19, (1 H. 7;) 2 Br. Abr. 130 a, *Petition*, pl. 2; stat. 2 and 3, Ed. 6, c. 8; 2 Br. Abr. 130, *Petition*, pl. 3; *The Case of the Wardens and Commonalty of Saddlers*, 4 Rep. 54 b; stat. 34 Ed. 3, c. 14; stat. 36 Ed. 3, c. 13; *Case of Basyng*, Ryley's Pl. Parl. 334, (35 Ed. 1;) S. C. 1 Rot. Parl. 170, No. 44; *The Bankers' Case*, Skinn. 601, 607; *Case of Everle*, Ryley's Pl. Parl. 251, (33 Ed. 1;) S. C. 1 Rot. Parl. 164, No. 52; *Viscount Canterbury v. The Attorney-General*, 1 Phill. Ca. Ch. 306; *Case of Gerveis De Clifton*, Yearb. Pasch. 22 Ed. 3, fol. 5 A. pl. 12; *Case of Robert De Clifton*, 1 Rot. Parl. 416, (18 Ed. 2,) No. 3; 3 Blackst. Com. 234, &c.; 1 Blackst. Com. 243; Finch's Law, B. 4, ch. 3, p. 256, (ed. 1759;) 2 Br. Abr. 130 b, *Petition*, pl. 12, 15, 16; ib. 131 a, pl. 21; ib. 131 b, pl. 24; Staundforde's Exposition of the King's Prerogative, ch. 22, p. 72 b, &c.; *Case of Cadell*, Ryley's Pl. Parl. 414, (14 Ed. 2;) S. C. 1 Rot. Parl. 378, No. 61; *Case of Yerward*, Ryley's Pl. Parl. 414, (14 Ed. 2;) S. C. 1 Rot. Parl. 378, No. 62; *Case of Northampton*, Ryley's Pl. Parl. 414, (14 Ed. 2;) S. C. 1 Rot. Parl. 378, No. 63; *Case of Aynesham*, Ryley's Pl. Parl. 251, (33 Ed. 1;) S. C. 1 Rot. Parl. 164, No. 48; *Case of Estretelyng*, Ryley's Pl. Parl. 251, (33 Ed. 1;) S. C. 1 Rot. Parl. 164, No. 49; *Case De Debitis*, Ryley's Pl. Parl. 253, (33 Ed. 1;) S. C. 1 Rot. Parl. 165, No. 59; Palgrave on the Original Authority of the King's Council, p. 23, 27; *Dixon v. Harrison*, Vaughan, 36, 47; *Rez v. Johnson*, 6 East, 583; *Case of Levesham*, Ryley's Pl. Parl. 641, (4 Ed. 3,) No. 27; S. C. 2 Rot. Parl. 49, No. 75; *Case of Bishop of Exeter*, 1 Rot. Parl. 421, (18 Ed. 2,) No. 18; *Case of Multon and Lucy*, Ryley's Pl. Parl. 263, (33 Ed. 1;) S. C. 1 Rot. Parl. 170, No. 98; *Case of Littleover*, Ryley's Pl. Parl. 263, (33 Ed. 1;) S. C. 1 Rot. Parl. 170, No. 99; *Case of Ely*, Ryley's Pl. Parl. 249, (33 Ed. 1;) S. C. 1 Rot. Parl. 163, No. 40; *Case of Payne*, Ryley's Pl. Parl. 231, (30 Ed. 1;) S. C. 1 Rot. Parl. 146, No. 2; Co. Ent. 422 a, *Petition de Droit*, pl. 2; *Case of Deyvill*, 1 Rot. Parl. 401, (15 & 16 Ed. 2,) No. 82; *Case of Hawise*, 1 Rot. Parl. 412, (15 & 16 Ed. 2,) No. 150; *Case of De Plat*, 1 Rot. Parl. 437, (19 Ed. 2,) No. 26; *Case of De Audela*, 1 Rot. Parl. 453, (12 Ed. 2,) No. 28; *Case of De Veer*, 1 Rot. Parl. 479, (incert. Edw. 1 & 2,) No. 110; Cases in 2 Rot. Parl. 37, 41, 45, (4 Ed. 3;) *Case of Belhouse*, Ryley's Pl. Parl. 253, (33 Ed. 1;) S. C. 1 Rot. Parl. 165, No. 61; *Case of Hide*, Ryley's Pl. Parl. 255, (33 Ed. 1;)

We may at first feel some regret that this line of \*objection was not directed at an earlier period against the method adopted by the suppliant for obtaining what he undertakes to prove to be his due. For, whatever \*degree of doubt may attach on almost every other part of the case, none can be seriously entertained that, if the proceeding were, of its own nature, and in point of law, incompetent for the purpose with which it was commenced, the Lord Chancellor might have been required at the very outset to bring it to an end, and prevent the expenditure of money and the endurance of anxiety for so long a period without the possibility of a favourable result. Considering, however, the length of time that has elapsed since any thing has been practically done in a petition of right, the imperfection of all the authorities, and the obscurity that hangs over this portion of our law, as well as the very complicated series of facts related, the course that has been taken can hardly excite surprise; much less should it provoke censure. It was natural, under such circumstances, that the advisers of the crown should require proof of all the facts that might be found to constitute a claim, without surrendering the point of jurisdiction: the question, namely, how far, on all those proofs being made out, this court has power to pronounce upon them any judgment in favour of the suppliant. Such at least is the position of things with which we are now to deal.

We may here observe that there is nothing to \*secure the

S. C. 1 Rot. Parl. 167, No. 71; *Case of Elæfend*, Ryley's Pl. Parl. 256, (33 Ed. 1;) S. C. 1 Rot. Parl. 167, No. 75; *Case of Hastings*, Ryley's Pl. Parl. 414, (14 Ed. 2;) S. C. 1 Rot. Parl. 377, No. 60; *Case of Burgesses of Scardeburgh*, 2 Rot. Parl. 221, (21 & 22 Ed. 3,) No. 60; *Case of Faversham Abbe*, Ryley's Pl. Parl. 646, (4 Ed. 3;) S. C. 2 Rot. Parl. 48, No. 68; *Penn v. Lord Baltimore*, 1 Ves. Sen. 444, 446; 4 Inst. 116; 3 Fitz. Ab. 6 a, (ed. 1565;) *Petition*, pl. 15, (see note (a) to *Smith v. Upton*, 6 Man. & G. 251;) *Reeve v. The Attorney-General*, 2 Atk. 223; *Mitford's Plead.* 31, (p. 33, in 5th ed.) 1 Daniell's Ch. Pr. 138, (2d ed.) ch. 4, s. 2; *The Attorney-General v. Aspinall*, 2 Myl. & Cr. 613; *In the matter of The Baron de Bode*, 4 Jurist, 645; Orders in Chancery of 26 Aug. 1841, order 14, Cr. & Phill. 371; *Manning's Exch. Pr.* 118, 127; *Stockdale v. Hansard*, 9 A. & E. 1, 183, 207; *Hill v. Bigge*, 3 Moore's Pr. C. C. 465, 476; *Madox's Hist. Exch.* ch. iii.; *Bracton*, fol. 107, b. 3, tract 1, c. 9, s. 1; *Britton*, *Introduct.* s. 4; *De petitionibus in Parliament*, Ryley's Pl. Parl. Appendix 442, iv., (8 Ed. 1;) *De ordinatione de petitionibus Parliament.* Ryley's Pl. Parl. Appendix, 459, (21 Ed. 1;) *Rex v. Portington*, 12 Mod. 31; *Case of Lodolawe*, Ryley's Pl. Parl. 261, (33 Ed. 1;) S. C. 1 Rot. Parl. 169, No. 88; *Introduction to Rot. Lit. Claus.* xxii. xxviii.; *Case of Waldeboef*, 1 Rot. Parl. 168, (33 Ed. 1,) No. 78; *Case of Crist-Church*, 1 Ryley's Pl. Parl. 241, (33 Ed. 1;) S. C. 1 Rot. Parl. 159, No. 3; *Cotton's Case*, Yearb. Hil. 2 Ed. 3, fol. 18, B. pl. 2; Yearb. Mich. 24 Ed. 3, fol. 64, B. pl. 69; 3 Fitz. Abr. 6 b, (ed. 1565;) *Petition*, pl. 19; *Proceedings, &c.*, of the Privy Council, vol. v. Pref. p. xc. &c. p. 316; 3 Inst. 242; *Case of De Grey*, 1 Rot. Parl. 397, (15 & 16 Ed. 2,) No. 59; Yearb. Mich. 10 H. 4, fol. 4 A, pl. 8; 1 Rot. Parl. 61, (18 Ed. 1,) No. 195; 37 Assis. fol. 218, pl. 11; Yearb. Pasch. 7 H. 7, fol. 10 B, 11 B. pl. 2; Yearb. Mich. 9 H. 4, fol. 4 A. pl. 17; Yearb. Hil. 21 H. 7, pl. 1, fol. 1 A, 3 A.; Yearb. Trin. 35 H. 6, fol. 60 A, 61 A, B. pl. 1; *Regina v. Tuchin*, 2 Ld. Raym. 1061, 1065; 1 Fitz. Abr. 272 a, (ed. 1565,) *Dette*, pl. 17; 1 Fitz. Abr. 137 a, (ed. 1565;) *Barre*, pl. 121; 2 Bro. Abr. 261 a, *Traverse d'office*, pl. 18; *Colebrooke v. Attorney-General*, 7 Price, 146; *Priddy v. Rose*, 3 Mer. 86, 94; *Ellis v. Earl Grey*, 6 Sim. 214, and *Oldham v. The Lords of the Treasury*, cit. ib. 220; *Proceedings against the Earl of Portland*, 14 How. St. Tr. 234, 261; Yearb. Mich. 39 H. 6, fol. 27 A. pl. 40; Yearb. Hil. 3 H. 7, fol. 2 B. pl. 10; *Moore v. Boulcott*, 1 New Ca. 323; *Willion v. Berkley*, Plowd. 223, 248; 3 Inst. 240, &c., ch. 106; *Brereton's Case*, 3 Dyer, 359 b, 360 a, pl. (5); 20 Vin. Abr. 14, *Stricti Juris*, pl. 8; Yearb. Mich. 11 H. 4, fol. 28 A. pl. 53; Yearb. Tr. 11 H. 4, fol. 80 B. pl. 23; Yearb. Mich. 13 H. 4, fol. 6 B. pl. 15; Yearb. Hil. 13 H. 4, fol. 14 B. pl. 11; Yearb. Hil. 21 H. 7, fol. 18 A. pl. 30.



crown against committing the same species of wrong, unconscious and involuntary wrong, in respect of money, which founds the subject's right to sue out his petition when committed in respect to lands or specific chattels: and there is an unconquerable repugnance to the suggestion that the door ought to be closed against all redress or remedy for such wrong. The reference from the crown to the law officers, and that of the law officers to the Chancellor, would seem to reject the ordinary rules and analogies of legal proceedings, in order to arrive at the conclusion, whether the subject's right has been in any manner infringed by the crown, and to show that, if the infraction is duly proved, reparation ought to be made. The dignity of the crown itself appears to demand that, when the inquiry which it has enjoined is so terminated, the proper course for giving effect to its second and more important injunction, that right be done, should be pursued. For this reason, without coming to any decision on matters which may be called technical, we feel it to be our duty to examine, in the first place, whether the facts found by the jury establish the right, supposing, for the present, that this remedy is given by our laws.

The Baron De Bode makes his claim in the character of a British subject whose real property in France was unduly confiscated by the French authorities during the revolutionary war, and who was therefore entitled to compensation by the fourth additional article of the treaty of 30th May. 1814, by the convention of 20th November, 1815, by the convention of 25th April, 1818, and by an act of the British parliament passed in 59 G. 3.(a) \*He asserts that, after the commissioners appointed  
\*275] under the last convention and the last act had examined and decided on all the claims of claimants duly registered, a sum exceeding 480,000*l.* still remained in their hands; that more than 200,000*l.* of this sum was applied to satisfy claims made after the time prescribed by the treaty, but examined by special authority from the lords of the treasury; and that the residue, also exceeding 200,000*l.*, was paid into the Bank of England on the government account by their direction. And these sums he claims as liable, in the hands of the crown, to make good the compensation which became due to him under the treaties and the act.

There is no one of the propositions which may be called the ingredients of this claim that is not encountered with formidable objections. Our duty is to examine them in detail. And two things are to be premised. First, the burden of proof lies wholly on the suppliant. Secondly, the verdict of the jury which sat in this court is the conclusive finding of facts, on which our judgment must proceed. They have affirmed the *ex parte* finding of a former jury summoned by the Lord Chancellor's order, in all its parts: but they have said nothing of the petition, which was the foundation of all the proceeding. The contents of the petition may be said to be put in issue by the Attorney-General's traverse of them, as well as of the inquisition: but no evidence was offered in proof of any allegation not



found in the latter.(a) Does then the inquisition set forth a title to obtain this money from the crown?

\*The suppliant's first step is his character of a British subject:(b) and this we shall assume, without entering on the argument, to be satisfactorily proved. But, taking it, as such an occasion requires, in its largest sense, the next question to be considered is, whether the suppliant is in such a situation that the treaty can apply to him.(c) In case of any misunderstanding between \*England and

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(a) The following were among the authorities mentioned on the questions, how far the inquisition could be looked into without reference to the petition; whether, on reference to the petition, the crown's title was sufficiently found by the inquisition; and as to the consequence of a defective finding.

Staundforde, Prerogative, 73 b, ch. 22, tit. *Petition*; Com. Dig. *Prerogative*, (D. 80;) Rastall's Ent. 461 a, *Petition*, pl. 1; Finch's Law, b. 4, ch. 3, p. 256, (ed. 1759;) *Case of Bishop of Exeter*, 1 Rot. Parl. 421, (18 Ed. 2,) No. 18; *Case of the Earl of Kent*, Yearb. Hil. 21 Ed. 3, fol. 47 A. pl. 68; Yearb. Mich. 13 H. 7, fol. 11 A. pl. 12; Yearb. Mich. 9 H. 4, fol. 6 A. pl. 20; Yearb. Hil. 4 H. 7, fol. 5 A. pl. 10; Yearb. Hil. 21 H. 7, fol. 18 A. pl. 30; Yearb. Mich. 3 H. 7, fol. 13 B. pl. 19; Yearb. Trin. 9 H. 6, fol. 20 A. pl. 15; Yearb. Mich. 39 H. 6, fol. 3 B. pl. 5.

(b) The following were among the authorities cited on this point.

*Count Wall's Case*, 3 Knapp's Priv. C. R. 13; *Countess Conway's Case*, 2 Knapp's Pr. C. R. 364; *Countess of Dalhousie v. McDonall*, 7 Cl. & Fin. 817; *Munro v. Munro*, 7 Cl. & Fin. 842; *Case of Aeneas Macdonald*, Foster's Crown Law, 59, (and see *ib.* 1st Disc. sect. 1, p. 183;) *Drummond's Case*, 2 Knapp's Pr. C. R. 295; *Daniel v. Commissioners for Claims on France*, 2 Knapp's Pr. C. R. 23; *Story's Case*, 3 Dyer, 298 b; *Story On the Conflict of Laws*, p. 47, s. 48, (Boston, 1834;) *Calvin's Case*, 7 Rep. 1 a, 6 a; Co. Lit. 8 a; 1 Hal. Pl. Cr. 69, 70.

(c) Printed extracts from the treaties, &c., were placed in the hands of the court by the suppliant. Some question arose, how far the court could look out of the inquisition, and take judicial notice of these documents. It appears that the judgment of the court does not determine this point, the decision having been against the suppliant upon the assumption that the court might look at the extracts.

*Taylor v. Barclay*, 2 Sim. 132, and *Van Omeron v. Dowick*, 2 Campb. 42, 44, were cited.

The following were among the authorities mentioned as to the construction of the treaties, and of stat. 59 G. 3, c. 31, and their applicability to the facts stated in the inquisition, and with reference to the questions, whether the jurisdiction appeared to be taken from this court, and whether the matter could be considered as *res judicata*, or as concluded by the recitals in the statute.

*Earl of Leicester v. Heydon*, Plowd. 384, 398; *Pilkington v. Commissioners for Claims on France*, 2 Knapp's Pr. C. R. 7; *Countess Conway's Case*, 2 Knapp's Pr. C. R. 364; *Daniel v. Commissioners for Claims on France*, 2 Knapp's Pr. C. R. 23; *Drummond's Case*, 2 Knapp's Pr. C. R. 295; *Webster's Case*, 2 Knapp's Pr. C. R. 386; Fost. Cr. L. 185, 1st Disc. ss. 3, 4; 4 Inst. 163; Com. Dig. *Justices of Peace*, (A 6,) (A 7,) (A 8;) 1 Br. Abr. 145 a, *Commissions and Commissioners*, pl. 9, 10, 11; *Triquet v. Bath*, 3 Burr. 1478; Beame's Elements of Pleas in Equity, p. 88; *Draper v. Crowther*, 2 Vent. 362; Mitford's Pl. 224, (p. 263, in 5th ed.) *Cooper's Pl.* 241; *Earl of Derby v. Duke of Athol*, 1 Ves. Sen. 202; S. C. 1 Dick. 129; *Bishop of Sodor and Man v. Earl of Derby*, 2 Ves. Sen. 337, 357; *Lord Comingsby's Case*, 9 Mod. 95; *Warwick v. White*, Bunb. 106; *Moravia v. Sloper*, 2 Com. Rep. 574; S. C. Willes, 30, 34, 37; *Blacket v. Lumley*, 1 Vent. 240; *Hanslap v. Cater*, 1 Vent. 243; *Pinager v. Gale*, 2 Vent. 100; *Sollers v. Lawrence*, Willes, 413; *Jennings v. Hankyn*, Carth. 11, 12; *Rex v. Mayor, &c., of Liverpool*, 4 Bur. 2244; *Cates v. Knight*, 3 T. R. 442; *Anonymous*, 1 Freem. C. B. 104; *Delbridge v. Pentyer*, 1 Freem. 315; *Harland v. Cocke*, 1 Freem. 315; *Stainton v. Randal*, 1 Freem. C. B. 260, 266; *Baker v. Holman*, 1 Freem. 316; *Anonymous*, 1 Freem. 319; *Higginson v. Martin*, 1 Freem. 322; *Godfrey v. Saunders*, 1 Sid. 87; *Anonymous*, Fitzgib. 44; *Ramsey v. Atkinson*, 1 Lev. 50; *Price v. Hill*, 1 Lev. 137; *Wallis v. Squire*, 2 (T.) Jones, 230; *Stanyon v. Davis*, 6 Mod. 223, 224; *Waldock v. Cooper*, 2 Wils. 16; *Emery v. Barlett*, 2 Str. 827; *Dye & Olive's Case*, March, 117; *Nabob of the Carnatic v. East India Company*, 1 Ves. Jun. 370, 388; S. C. as *Nabob of Arcot v. The East India Company*, 3 Bro. C. C. 292, 301; *Strode v. Little*, 1 Vern. 59; *Cunningham v. Wegg*, 2 Bro. C. C. 241; *Jones v. Moldrin*, 3 Lev. 141; *Mostyn v. Fabrigas*, 1 Cowp. 161, 172; *Baynes v. Baynes*, 9 Ves. 462; *Attorney-General v. Lord Hotham*, Turn. & R. 209, 218; *Shoen v. Rickie*, 5 M. & W. 175, 181; *Tebbutt v. Selby*, 6 A. & E. 786; *Morgan v. Seaward*, 2 M. & W. 544, 561; Yearb. Mich. 35 H. 6, fol. 1 A. pl. 1; *Hill v. Reardon*, 2 Russ. 608, 630.

France, "the subjects of each of the two parties, residing in the dominions of the other, shall have the privilege of remaining and continuing their trade therein, without any manner of disturbance, as long as they behave peaceably, and commit no offence against the laws and ordinances; and in case their conduct shall render them suspected, and the respective  
 \*278] governments should be obliged to order them to remove, the term of twelve months shall be allowed them for that purpose, in order that they may remove with their effects and property, whether intrusted to individuals or to the state. At the same time it is to be understood that this favour is not to be extended to those who shall act contrary to the established laws." The treaty of 1814 (additional art. 4) provides for taking of sequesters, and provides that commissioners "shall undertake the examination of the claims of his Britannic majesty's subjects upon the French government, for the value of the property, movable or immovable, illegally confiscated" (*induement confisqués*) "by the French authorities, as also for the total or partial loss of their debts or other property, illegally detained under sequester, since 1792." Next, the treaty of 20th November, 1815, in its ninth article, declares the necessity of executing the fourth additional article of the preceding treaty. Finally, another convention of the date last mentioned begins with the following article: "The subjects of his Britannic majesty having claims upon the French government, who, in contravention of the second article of the Treaty of Commerce of 1786, and since the first of January, 1793, have suffered on that account" (*ont été atteints, à cet égard, par les effets de la confiscation, &c.*) "by the confiscations or sequestrations decreed in France, shall, in conformity to the fourth additional article of the treaty of Paris of the year 1814, themselves, their heirs or assigns, subjects of his Britannic majesty, be indemnified and paid, when their claims shall have been admitted as legitimate, and when the amount of them shall have been ascertained according to the forms and under the conditions hereafter stipulated."

\*279] "At this point one would naturally expect, if the treaty of commerce had undergone no alteration, that the suppliant should set forth the particulars in which its second clause has been violated in respect to him: that is, that he had been prevented, on the rupture between the two states, from removing his property and effects. But the first article of the convention No. 7, certainly extends the operation of the treaty of commerce to cases of the *undue confiscation* of the property of his Britannic majesty's subjects. Then his allegation ought to have been that his property was unduly confiscated; and the particulars ought to have been shown. The spirit of the two treaties combined seems to be this. "We have engaged to protect your property, as long as you reside in France under the treaty of peace. If you shall make it clear that the revolutionary government unduly confiscated instead of protecting it, when the rupture occurred, we will give you compensation for the loss that has

ained." But the inquisition here, as in its former parts, merely states the facts that occurred, and leaves to the court the duty of drawing the inference that the property was unlawfully confiscated. It does not find that the confiscation followed the rupture, or was caused by it: on the contrary, the cause must be collected from this statement to have been the suppliant's violation of the law of France adjudged by some tribunal in that country. The conduct for which the sentence was passed was called by the name of "emigration:" how defined and qualified by the law we are left in ignorance. We cannot take judicial notice of the meaning of that word, nor pronounce the law illegal, or (in the English phrase) undue, unless it were manifest that any law which subjected any act of emigration to "the penalty of confiscation must be in its nature void when applied to any British subject residing in France. [\*280

But this general proposition cannot be maintained, unless the birth in England made the suppliant so exclusively and indefeasibly a British subject that he could not be in any way amenable to French law: and this would be inconsistent with the principle of local allegiance recognised by our own law, and conformable, for aught we know, to the law of France. If this law of emigration is not proved to us to be absolutely void as against the suppliant, we find no complaint made of its being unlawfully enforced by the French tribunal which pronounced sentence under it. An inquiry of that nature would indeed be singular, and would lead us to the performance of functions for which we are wholly incompetent. We must constitute ourselves a court of error on points of law, and a court of appeal in matters of fact, for the revision of all sentences which were pronounced against British subjects, after the rupture, for any offence whatever. In the large sense that must be assigned, for this argument, to the expression "*indûment confisqués*," any one of them unjustly condemned for highway robbery, whose attainder may have drawn after it the forfeiture of his land, may bring himself within this clause, and entitle himself to full compensation, if a Middlesex jury shall now think the conviction wrong. Whatever we may know historically of the conduct of the courts during the Revolution, we certainly should not be justified in pronouncing their judgment wrong in any particular case without, at least, some direct proof. But here the inquisition itself records one piece of evidence, without stating that that was all the evidence adduced, which goes far to "establish what would be commonly understood to be a case of emigration: that the Baron De Bode "took refuge" in the Austrian army, which was at that time invading the soil of France. [\*281

But, supposing now that these doubts are groundless, and that the suppliant has brought himself within the terms of the treaty, the next requisite is, to show that he has availed himself of its provisions. He is to be indemnified and paid, when his claim shall have been admitted to be legitimate, and when the amount of it shall have been ascertained, according to the forms and under the conditions stipulated.

No statement appears in the inquisition that the claim has been admitted as legitimate, or that the amount has been ascertained; but the contrary in both respects: and recourse must be had to the subsequent treaty of 1818, and the statute 59 G. 3, c. 31, founded upon it, by which the time of preferring claims was extended for those claimants who had let slip the former opportunity.

The treaty is quoted in general terms for its object; and recites that funds had been provided for effecting it. The act is also quoted in the inquisition. The claimants, to whom the indulgence is granted, are such persons as shall have caused their names to be inserted in the register provided for claimants within the period prescribed by the convention of 1818. The suppliant alleges, and the inquisition finds, that neither his name nor his claim had been placed on this register till after the passing of the act. He, therefore, does not fall within the enacting clause; and his right to receive the money is shaped in a different manner.

\*282] The registered claimants are, first, to receive the \*sums adjudged to them; and the commissioners of deposit, during the time that any capital remains in their names unappropriated to claimants, are authorized, on receiving directions from the Lords of the Treasury, to part with it for payment of such claims, or, if they are all paid, to apply it to such other purposes as the Lords of the Treasury should direct. And the inquisition finds that, after payment of all the registered claims that have been established, a surplus exceeding 480,000*l.* remained in the hands of the Commissioners of deposit, out of which 200,000*l.* were applied to payment of claims, tendered too late under the convention of November, 1815, but admitted under the authority of the Lords of the Treasury: and the residue was paid into the Bank of England on the government account by direction of the Lords of the Treasury, in pursuance of the act. This is the residue, says the suppliant, of the money paid by the French government to the English, in trust for himself and the other British subjects whose property was unlawfully confiscated: and, as all the other claims have been discharged, I call upon the English government to apply it towards making good my loss.

We do not see how it is possible to extract any claim, legal or equitable, out of these circumstances, to the payment of any money. The amount does not appear to have been ascertained, nor the claim to any amount established: nor do we find that the Lords of the Treasury have granted the indulgence with which others have been favoured, or even have been requested to institute any inquiry into the validity of the Baron's claim.

\*283] He might very possibly have had just ground for making \*such a request, and might reasonably have expected that they should not lose their control over any sum remaining with the commissioners of deposit till such inquiry had been brought to a close: but they might have lawfully, and, perhaps, with good reason, refused that indulgence

the inquiry might have turned out unfavourably to the Baron's claim. they might have thought others entitled to a preference over him.

Assuredly, there is no account in which this or any other sum stands to his credit. The court is left, once more, to draw an important inference which the suppliant ought to have drawn for himself, stating the premises whence it flowed. The inference suggested is, that the whole 200,000*l.* is virtually his: the premises must be that no other claimant can possibly come in to claim any part of it. But this fact is unknown to us, and can by no means be deduced from the length of time that has elapsed. The Baron's own claim, so recently brought forward, is an example which demonstrates the contrary proposition.

We must not pass over one of the allegations appearing in the petition, which is not affirmed by the finding in the inquisition,—the award made by the commissioners in 1822, rejecting the claim, and confirmed by the Privy Council on appeal in 1823; not that we conceive ourselves at liberty to assume this fact to be true, even as against the suppliant who states it, but that we may not be supposed to have omitted all consideration of it. In truth, it suggests a dilemma to which, as an argument, great weight is due. The inquisition, the only subject of our deliberation, states nothing on the subject. Then, either an inquiry has taken place on the suppliant's application and turns out unfavourable to him, or none has taken place and he is not in a position to ask for the money. We are, in either case, left without the means of seeing that the surplus has been received to his use by any one. [\*284]

Even if that could be maintained, the question would remain, whether her majesty can be said to have received the money. This is not found. We cannot adjudge the fact on the allegation that it was paid into the Bank of England on the government account, which may be true, in numerous modes of construing language so indefinite, without any participation of the sovereign.<sup>(a)</sup> The attempt to fix the sovereign, individually, from the decision of my brother COLERIDGE,<sup>(b)</sup> in the Bail Court, when he discharged the rule for a mandamus to the Lords of the Treasury to pay the Baron, on the ground that they were, in fact, the servants of the crown in holding the money, cannot prevail. They were, by the very supposition on which that rule was obtained, the servants of the crown, acting for the crown in parting with the money: and the incongruity of the sovereign issuing a writ to the sovereign would have occurred if this court had directed the mandamus to those servants. This preliminary objection dispensed with any examination of the others. It has no

(a) The following were among the authorities mentioned on this point. *Rex v. The Lords Commissioners of the Treasury*, 4 A. & E. 286, 298; *In re Baron De Bode*, 6 Dowl. P. C. 776; 3 Blackst. Com. 254, &c.; Stat. 4 & 5 W. 4, c. 15; Yearb. Mich. 9 H. 4, fol. 4 A. pl. 17; Yearb. Hil. 4 H. 7, fol. 1 A. pl. 1; Yearb. Mich. 7 H. 4, fol. 33 A. pl. 20; *Newland v. Attorney-General*, 3 Mer. 684; *Milford v. Reynolds*, 1 Phil. Ch. Ca. 185; *Gidley v. Lord Palmerston*, 3 Br. & B. 275.

(b) *In re Baron De Bode*, 6 Dowl. P. C. 776, 792.



\*285] bearing on the proof, required in support of a \*petition of right, that the sovereign has or has had a personal benefit from that which is sought to be received at his hands.

We have thought it right to express the doubts that have been felt among us on some of the earlier points alluded to. But on the point last mentioned none of us feel any doubt. We all think that this money has not been received by the sovereign, and further, that it has not been received to the suppliant's use. Hill's rule discharged.

The Solicitor-General's rule made absolute.

The following entry was made, immediately after the verdict stated in p. 268, *antè*.

"And, because the court of our said lady the queen now here are not as yet advised of giving their judgment of and upon the premises, day thereof is given to the parties aforesaid, until the 2d day of November in the year of our Lord 1844, before our said lady the queen, at Westminster, to hear their judgment thereupon, for that the said court of our said lady the queen here are not yet advised thereof.

"At which day, before our said lady the queen, at Westminster, come as well the said suppliant by his attorney aforesaid as the said Attorney-General in his own proper person. And, because the court," &c., (continuances by Curia advisari vult, down to 2d November, 1845.)

"At which day," &c. "Whereupon, all and singular the premises being seen by the court of our said lady the queen here, and fully understood, and mature deliberation thereof being had, it is considered, by the \*286] \*said court here, that the said suppliant take nothing by his petition aforesaid, but, for his false claim, be thereof in mercy, &c.: and that the said Attorney-General of our said lady the queen may go thereof without day, &c."

### DAVIS against CURLING. *Wednesday, December 10th.*

Declaration, in case, charged that defendant was, under the highway act (5 & 6 W. 4, c. 50,) surveyor of the parish of T.; that gravel had been placed on a highway in T., by means of which gravel the highway was obstructed and the gravel was a nuisance to the public: that defendant had notice, and was requested to remove the same; but he, well knowing, &c., did not nor would, in a reasonable time, remove or cause it to be removed, but, on the contrary, conducted himself with gross negligence, and knowingly, wilfully and wrongfully, and in violation of his duty as such surveyor, permitted, suffered and caused the gravel to continue and be upon the highway, obstructing the same, remaining and being a nuisance to the public, for a long and unreasonable time, without taking any care or precaution to guard against danger or damage to persons passing, contrary to his duty in that behalf as such surveyor: by means of which, plaintiff's carriage was overturned.

It was proved that defendant had notice of the gravel being laid, and had been guilty of want of care in leaving it there, and that this had caused the accident.

*Held*, that defendant was charged with a thing done in pursuance of the act, and was therefore entitled to notice under sect. 109.

CASE. The declaration charged that, whereas, before and at the time of the committing of the grievances, &c., and after the passing of a certain



act, &c., (Highway Act, 5 & 6 W. 4, c. 50,) defendant was a surveyor, appointed under the said act, in and for the parish of Tottenham in Middlesex; and whereas, also, before the committing, &c., a large quantity of gravel, stones, &c., had been and was laid, put and placed upon and in a certain public highway within the said parish called Marsh Lane, and which said public highway, before and at the time of the committing, &c., was under the survey, care and superintendence of defendant as such surveyor; and by means of which said gravel, &c., the said highway was very much straitened and obstructed; and the said gravel, &c., had become, and \*were, a nuisance to the public passing along the said highway; of all which premises defendant before the committing, [ \*287 &c., to wit, on, &c., had notice, and was then requested to remove or cause the same to be removed from and out of the said highway: Yet defendant, well knowing the premises, but contriving, &c., to injure plaintiff, did not nor would, although a reasonable time for his so doing passed and elapsed after he had such notice, and before the happening of the injury to plaintiff after mentioned, remove or cause or procure to be removed the said gravel, &c., from and out of the said highway; but, on the contrary thereof, defendant, from the time of his receiving and having such notice, to wit, from, &c., “continually, up to and until the happening to the plaintiff of the injury hereinafter mentioned, behaved and conducted himself with gross negligence in and about the premises, and knowingly, wilfully, and wrongfully, and in violation of his duty as such surveyor as aforesaid, allowed, permitted, suffered and caused the said gravel,” &c., “to remain, continue and be in and upon the said highway, straitening and obstructing the same, and remaining and being a nuisance to the public passing along the said highway, for a certain long and unreasonable space of time in that behalf, to wit, six weeks, without taking any care or precaution whatsoever to guard against danger or damage to persons passing along the said highway, contrary to his, the defendant’s, duty in that behalf as such surveyor as aforesaid.” By means and in consequence of which premises, and of defendant’s said breach of duty, and not otherwise, afterwards, and before the commencement of the suit, to wit, on, &c., in the night time of the said day, a certain carriage of the plaintiff, of great value, \*to wit, &c., with the [ \*288 plaintiff therein, then going and passing in and through the said highway, was unavoidably driven upon and against the said gravel, &c., and was thereby then overturned: by means whereof the plaintiff then became, &c., greatly hurt, &c.

Plea, Not guilty, by statute. (a) Issue thereon.

On the trial, before WIGHTMAN, J., at the Middlesex sittings after Michaelmas term, 1844, evidence was given to show that, while defendant was surveyor for Tottenham, some men who were employed by him to cart gravel, put the gravel in question on the roadside, where it remained

(a) Stat. 5 & 6 W. 4, c. 50.

for a month, and up to the time of the accident. Some evidence was also given for the purpose of fixing the defendant with knowledge that the gravel was there. The defendant's counsel contended that, under sect. 109 of stat. 5 & 6 W. 4, c. 50, defendant was entitled to notice of action; and that, no notice being proved, (a) there must be a nonsuit. The learned judge gave leave to move on this point, and left to the jury, first, whether defendant knew that the gravel was in the place described; secondly, whether there was want of care by defendant in leaving it there; thirdly, whether that caused the accident. Verdict for plaintiff.

In Hilary term, 1845, *Petersdorff* obtained a rule nisi for a nonsuit.

*Bovill* now (b) showed cause. The question of knowledge was for the jury: and, as they have found a \*verdict for the plaintiff, the  
 \*289] only question is, whether the omission of the defendant to remove a nuisance of which he knew, is "any thing done in pursuance of or under the authority" of stat. 5 & 6 W. 4, c. 50, within the meaning of sect. 109. It is true that an act done under colour of the authority of the statute, though not strictly warranted by it, might fall within the provisions of the section; but the declaration shows only an omission; and the evidence proved no more; and the injury is not produced by any pursuance of the act. In *Umphelby v. McLean*, 1 B. & Ald. 42, (c) it was held that a collector of taxes was not protected by want of notice, under stat. 43 G. 3, c. 99, s. 70, from an action for money had and received, brought to recover an overcharge, because nothing was alleged to have been done in pursuance of the act. In *Elliot v. Allen*, 14 L. J. (N. S.) Com. P. 136; S. C. 1 Com. B. 18; (d) MAULE, J., said: "If parties act in pursuance and by authority of," &c., (the local act then under discussion,) "they will be justified under the plea of Not guilty; if in pursuance, but not by authority, of the statute, then they are entitled to notice." The defendant here, by sect. 109, is allowed to plead the general issue in the cases where notice is required, instead of justifying; but in this case no justification could be pleaded. In *Wright v. Horton*, Holt's N. P. C. 458, it was held that a party sued for acting as a magistrate after having lost his qualification was not entitled to notice under stat. 24 G. 2, c. 44, s. 1. A party charged with acting as commissioner where he was personally  
 \*290] interested, under a local statute which prohibited such \*acting, was held not entitled to treble costs under a clause speaking only of "any act or thing done in execution of, or under the authority of," the act; *Charlesworth v. Rudgard*, 1 C., M. & R. 498, 505, note (a), 896; S. C. 4 Tyrwh. 824; 5 Tyrwh. 476. That a non-feasance is not within clauses of this kind, appears from *Atkins v. Banwell*, 3 East, 92. And where the

(a) Some letters were insisted upon as amounting to notice; but they appeared not to contain the legal requisites.

(b) A part of the argument was heard on December 9th.

(c) See *Charrington v. Johnson*, 13 M. & W. 856.

(d) But the dictum does not appear.

act gives no colourable authority for the thing complained of, such a clause is inapplicable. In *Carpue v. London and Brighton Railway Company*, 5 Q. B. 747, 754, where the Company were sued for an accident charged to have occurred from their bad management in conveying passengers, PATTESON, J., upon a similar clause being cited to show that notice of action was necessary, said: "Sect. 253" (the clause referred to) "speaks only of 'any thing done or omitted to be done in pursuance of this act.' No part of the clause points to merely doing a thing negligently. If the Company carry so carelessly as to mutilate their passengers, is that any thing done or omitted to be done in pursuance of the act?" [Lord DENMAN, C. J. Perhaps that was said with reference to the point on which the decision turned, that the Company were acting merely as common carriers; and to the case of *Palmer v. The Grand Junction Railway Company*, 4 M. & W. 749, where the same point was ruled, but where PARKE, B., said: "If the action was brought against the Railway Company for the omission of some duty imposed upon them by the act, this notice would be required."] *Dowell v. Beningsfield*, Car. & Marsh. 9, affirms the principle now contended for; and *Cook v. Leonard*, 6 B. & C. 351, and *Shatwell v. Hall*, 10 M. & W. 523, are to the same effect.

\**Petersdorff*, (with whom was *Edwin James*,) contra. The charge is that the defendant, being surveyor, in the execution of his trust was guilty of the act described: the knowledge was expressly found; and that shows that the act was wilful on the part of the defendant, as charged in the declaration. If the persons employed by the defendant had laid the gravel, and suffered it to continue there, without his knowledge, the declaration would not have been proved, because then the act of the person employed would not have been the act of the defendant. The cases where actions are brought for non-payment of money are inapplicable; there nothing is charged but an omission, not, as here, a concurrence in a positive tort. Such are *Umphelby v. McLean*, 1 B. & Ald. 42, (which, however, is scarcely consistent with *Waterhouse v. Keen*, 4 B. & C. 200,) and *Atkins v. Banwell*, 3 East, 92. Again, actions for penalties, where the gist of the complaint is that the defendant is acting in direct contravention of the statute, have no analogy with such an action as the present: this applies to *Wright v. Horton*, Holt's N. P. C. 458, and *Charlesworth v. Rudgard*, 1 C., M. & R. 896; S. C. 5 Tyrwh. 476. No amends could be tendered in such a case. Another class of cases inapplicable here comprehends actions for acts done independently of, and without reference to, the powers given by the statute. Such are *Palmer v. The Grand Junction Railway Company*, 4 M. & W. 749; *Carpue v. London and Brighton Railway Company*, 5 Q. B. 747; *Morgan v. Palmer*, 2 B. & C. 729; and *James v. Saunders*, 10 Bing. 429. Here the declaration insists upon the official character of the defendant: had he not been surveyor, the plaintiff would have been nonsuited. It is in that character that he is charged with gross negligence in

chase respectively into which the said forest or chase has, during all the time aforesaid, been, and still is, divided, and such parts of the said unenclosed commons as are adjoining to the said four quarters or bailiwicks respectively; and have been used, during all that time, to be so made by virtue of four several warrants of the said master forester commanding, in the name of the lord for the time being of the said manor and forest or chase, a drift to be made for each of the said four quarters respectively; and, upon the occasion of such drift for the quarter of the said forest or chase called the north quarter, the custom, during all the time aforesaid, has been to cause all the cattle then found depasturing in the said last-mentioned quarter of the said forest or chase, and in such parts of the said

\*296] unenclosed commons as are next adjoining to the said last mentioned quarter, to be driven to a certain place, to wit, a place called Creber Pound, situate within and parcel of the said place in which, &c., in the first count mentioned, there to be examined and taken account of, in order to ascertain whether any of the said last-mentioned cattle were estrays or unlicensed cattle, and whether any of the said commoners called venville tenants, so entitled to such common of pasture as aforesaid, or any other commoners having rights of common thereupon, have surcharged the said forest or chase and commons by depasturing thereon more or other cattle than they of right ought by reason of their said respective lands and tenements or otherwise; and, if, upon the occasion of such drift, any of the said commoners have been found, upon such examination and account as aforesaid, to have so surcharged the said forest or chase and commons at the time of such drift, then the cattle wherewith the said forest or chase and commons have been so wrongfully surcharged, or so many thereof as have been then found depasturing and doing damage in the said north quarter of the said forest or chase or in the parts of the said commons next adjoining thereto, have been used, by the custom aforesaid, and of right ought, to be taken to a certain common pound within the said lordship or manor and forest or chase, to be there impounded for the damage so done as aforesaid; and the cattle, which have been found upon the occasion of such drift as aforesaid rightfully depasturing in the said forest or chase or the said adjoining commons, have been used, by the said custom, and of right ought, to be forthwith released and set at large. That plaintiff, long before and at the said time

\*297] when, &c., had been \*and was a venville tenant, being the freehold tenant of certain of the said lands and tenements near to the said forest or chase; by reason whereof he was, at the said time when, &c., entitled to have, and ought of right to have had, for himself and his farmers, occupiers of the said lands and tenements, such common of pasture for cattle levant and couchant thereon as hereinbefore described in and over the said forest or chase and the said unenclosed commons adjoining, as to his said lands and tenements belonging and appertaining; that, just before the said time when, &c., to wit, on, &c., the defendant Simon had

been and was required by the warrant of the master forester of the said forest or chase, in the name of his said royal highness, to make the drift of cattle for the said north quarter of the said forest or chase on a certain day therein named, to wit, on, &c., according to the said ancient custom, and for that purpose to summon to his assistance as many men as he the said Simon should think proper; whereupon the defendant Simon, and the defendant William in his aid, (the said William having been before then duly summoned and required by the said Simon to assist in that behalf,) did afterwards, to wit, on the said, &c., in pursuance of the said last-mentioned warrant and of the custom aforesaid, drive all the cattle then found depasturing in the said north quarter of the said forest or chase, and in such parts of the said unenclosed commons as were and are next adjoining to the last-mentioned quarter, to the said place called Creber Pound, there to be examined and taken account of, in order to ascertain whether any of the last-mentioned cattle were estrays or unlicensed cattle, or whether any of the said commoners, so entitled to such common of pasture as aforesaid, had surcharged \*the said forest or chase and commons by depasturing thereon more or other cattle than they of right ought by reason of their said respective lands and tenements or otherwise: and, upon the occasion of the said drift, at the said time when, &c., the cattle of the plaintiff in the first count mentioned were found by the defendants depasturing and doing damage in the said place in which, &c., called Gidley Common; and the cattle of the plaintiff in the second count mentioned were then found by the defendants depasturing and doing damage in the said place in which, &c., called Throwleigh Common; the said several places in which, &c., being parcel of the said unenclosed commons next adjoining to the north quarter of the said forest or chase: that, upon an examination and account thereupon made and taken of the cattle so driven by defendants to the said place called Creber Pound, it was found that, before and at the time of making the said drift, plaintiff had wrongfully surcharged the said forest or chase and commons, by depasturing thereon divers cattle, being the cattle in the first and second counts mentioned, the same not being cattle levant and couchant on the lands and tenements by reason whereof plaintiff was then entitled to such common of pasture as aforesaid; wherefore defendants, in pursuance of the said custom and warrant, then detained the said cattle of plaintiff for the purpose of taking them to the common pound aforesaid within the said lordship or manor and forest or chase, there to be impounded for the damage so done by them as aforesaid; as they lawfully might, for the cause aforesaid. Which are the same several takings and detainings, &c. [\*298]

Replication. That, although true it is that his said royal highness was and is seised in his demesne as of \*fee, in right of his said duchy, of and in the lordship with the said forest or chase of Dartmore with the appurtenances, and that, from time whereof, &c., there have been [\*299]



and are divers large unenclosed commons or pieces of waste next adjoining the said forest and communicating therewith, in manner and form as in that (the 6th) plea alleged, nevertheless, for replication in this behalf, plaintiff saith that defendants of their own wrong, and without the residue of the causes or matters of excuse in the said last plea in that behalf alleged, took and detained the said cattle of plaintiff in manner and form as in the said declaration alleged. Conclusion to the country.

Demurrer, assigning for cause that the replication is multifarious and double, and puts in issue too many of the facts stated in the plea; that it admits only immaterial matters and mere inducement, and then, under a traverse of the residue of the causes and matters of excuse, includes a great variety of averments, some one only of which ought to have been distinctly and separately traversed; that some of the allegations traversed in such general terms set up an interest or right in and over the closes mentioned in the first and second counts of the declaration, namely, a right to make drifts of cattle in and over the said closes, and to take cattle surcharged on the same, and to collect together cattle, so driven or surcharged, in and upon a part of one of the said closes for the purpose of examination; that the replication includes, in such general traverse, a justification by authority of law, and matter of interest and title, and not mere matter of excuse. That the replication ought to have denied the custom of drift, as stated, and admitted the residue, or to have admitted  
 \*300] the \*custom and denied the residue. That such a custom as that stated in the plea ought, if denied, to be traversed specially, and not generally with other allegations. That the justification alleged in the plea is dependent upon the title of the plaintiff, as the tenant and occupier of lands with a prescriptive common appurtenant, and so is derived mediately and indirectly from the plaintiff himself. That the plea justifies by reason of wrongful acts of the plaintiff himself, namely, by surcharging the said commons, by which acts he has given an implied authority to make the drift, and, for that purpose, to enter on the closes and take the plaintiff's cattle. That the defendants justify by the command of one who sets up title as lord of the manor, and by force of a custom; and the plaintiff ought not therefore to reply by a general traverse. That the plea of justification is not one to which the replication *De injuriâ* applies by the general rules of pleading; and such general rules cannot be evaded by omitting from the traverse a superfluous or immaterial statement, or one which is inducement only and not the substance or foundation of the defence.

Joinder in demurrer.

The demurrer was argued in the last Easter term.(a)

*Smirke*, for the defendants. The replication *De injuriâ* is inadmissible. It puts in issue all the matter in the plea, except the seisin of the Prince of Wales and the immemorial existence of the commons adjoining to and

(a) April 29th Before Lord Denman, C. J., Patteson, Williams, and Coleridge, J.



communicating with the forest. The attempt on \*the plaintiff's part appears to be to take this case out of the rule in *Crogate's Case*, 8 Rep. 66 b, which prohibits the replication *De injuriâ* where the defendant claims "any interest in the land, or any common," either "in his own right, or as a servant," or alleges "an authority given by the law." With this object, the seisin and the existence of the commons are admitted. But the matter left unadmitted cannot be traversed in this form. The custom is put in issue, and the act of the plaintiff in surcharging the common, which is in the nature of an authority given by the plaintiff to the defendants to do the act complained of. In *Salter v. Purchell*, 1 Q. B. 209, 219, TINDAL, C. J., explained the principle of the exception in *Crogate's Case*, as to authority from the plaintiff or interest in land. "In those instances in which the plea goes only to matter of excuse or justification, and where, consequently, the general traverse is allowed, there is engrafted an exception, that, where the plea justifies under an authority or command or license from the plaintiff, the general replication is not good without a special traverse of such command, license, or authority. And the exception to the rule, so far from being arbitrary, appears to be founded in good sense. For, although the plaintiff may be well allowed by his general replication to put in issue and to compel the defendant to prove all the facts which constitute his defence, when they lie in his, the defendant's, exclusive knowledge, yet, where facts are pleaded which lie equally in the knowledge of the plaintiff and the defendant, such as an authority or license given by the plaintiff, there is no reason for compelling the defendant to prove them, unless the plaintiff thinks proper to \*deny them by a special traverse. And the same reason will explain a similar exception from the general rule, where the defendant claims in his plea any interest in or out of land; for such interest must have been granted originally either by the plaintiff himself or those to whom he is privy in estate." The same principle applies here; for the plaintiff's right of common and surcharge are matters within the plaintiff's knowledge. But, further, the replication is bad for traversing in this form the custom, which is the root of the title on which the defendants rely. The replication indeed puts the defendants on proof of the plaintiff's right of common. That a custom cannot be so traversed was laid down in *Banks v. Parker*, Hob. 76, 5th ed.; the error was there said to be only formal; but here the demurrer is special. On the authority of the case in *Hobart* it is laid down in *Com. Dig. Pleader*, (F. 20,) that, "If the defendant justifies by the custom of a manor, de son tort, &c. generally, is not a good replication, but it ought to traverse the custom." It is, indeed, there added: "*Cont. per three J. Lev. acc. 49.*" The case referred to is *Wells v. Cotterell*, 3 Lev. 48: in that case, however, one judge held the replication bad, but there was an unanimous judgment for the plaintiff on account of defect in the cognisance, which set up a bad custom. The record is in Levinz's Entries, 154, whence

it appears that the demurrer was general and not special, so that the objection against the replication could not prevail. [WIGHTMAN, J. I think that explanation of the authority is inadmissible: *Fursdon v. Weeks*, 3 Lev. 65, shows that the objection might then be taken on general demurrer.] \*303] The point was at that time scarcely settled. And again, the plea in *Fursdon v. Weeks* set up matter of record, which of course cannot be traversed by a *De injuriâ*; *Crogate's Case*, 8 Rep. 66 b; and this last objection would probably avail now on general demurrer. Further, the replication violates the rule in *Crogate's Case*, because the plea sets up "an authority given by the law;" *Bowler v. Nicholson*, 12 A. & E. 341. It also sets up an interest in virtue of which the defendant acts; and this is traversed generally; for the seisin, which is specially excluded from the traverse, is no part of the title on which the plea depends. In *Crogate's Case* the replication would have been equally bad, though the seisin of the bishop had been specially traversed.

Next, the plea is good. (a) (The argument as to this is omitted.)

*Crowder*, contra. First, the plea is bad. (The argument as to this is omitted.) Next, the replication is good. No interest is alleged in the defendants: they do not claim to be entitled to the cattle; nor does the \*304] plea set up any right to even the temporary possession of them before they were taken. *Bardons v. Selby*, 1 C. & M. 500; S. C. 3 Tyrwh. 430; 9 Bing. 756, affirming *Selby v. Bardons*, 3 B. & Ad. 2, is precisely in point. In the King's Bench, PARKE, J., explained the rule thus: (b) "Lord COKE says, after laying down these three rules, that the general plea *De injuriâ*, &c., is properly when the defendant's plea doth consist merely upon matter of excuse, and of no matter of interest whatever. By this I understand him to mean an interest in the realty, or an interest in, or title to chattels, averred in the plea, and existing prior to, and independently of the act complained of, which interest or title would be in issue on the general replication; and I take the principle of the rule to be, that such alleged *interest or title* shall be specially traversed, and not involved in a general issue. It is contended, however, on the part of the defendants, that the interest here meant, is one that the party would acquire by the seizure which forms the subject of complaint, and that the replication would be improper whenever the defendant justified under any proceedings by which, if rightful, he would

(a) The objections were: that the custom was invalid; that it was laid as extending over commons, not expressly alleged to be part of, or even open to, the forest; that the claim was in the nature of a claim to profit à prendre in alieno solo; that the custom was uncertainly described as to its effect and local extent; that the pound was not shown to be within a convenient distance; that, according to the plea, strangers might enforce the right of the commoners.

Reference was made to *Follet v. Troake*, 2 Ld. Raym. 1186: (Smirke produced a copy of the record;) *Gateward's Case*, 6 Rep. 59 b; *Bean v. Bloom*, 2 W. Bl. 926; S. C. 3 Wils 456; stat. 32 H. 8, c. 13, s. 6; 4 Inst. 309; 7 Vin. Abr. 183, tit. *Customs* (E), pl. 19; *Tyson v. Smith*, 9 A. & E. 406, 422, in Exch. Ch. affirming S. C. in K. B., 6 A. & E. 745; *Taylor v. Devy*, 7 A. & E. 409; *Blewett v. Tregonning*, 3 A. & E. 554.

(b) P. 13.

acquire an interest or a special property. If this were the meaning of the term 'interest,' a general replication would be bad to a plea to an action of trespass justifying seizure under process of the Admiralty Court, or of any inferior jurisdiction not of record. So, in case of a justification of taking beasts in withernam, (16 Hen. 7, 2.) So of a justification of seizure for salvage, 2 Lilly's Entries, p. 349.(a) And yet in all these cases it appears to be settled that the general traverse is permitted. It seems to me, \*therefore, that the objection is applicable to these cases only [\*305 where a party justifies *as having* an interest, or under one who has an interest, by title at the time of the act complained of, which interest would therefore be put in issue by the general traverse." The principle, so explained, defeats the objection rested on the ground that an interest is alleged by the defendants. Cases on this subject are collected in note (1) to *White v. Stubbs*, 2 Wms. Saund. 295. Nothing more than an obiter dictum occurred in *Banks v. Parker*, Hob. 76, 5th ed. [WIGHTMAN, J. In Com. Dig. *Pleader*, (F 20,) it is said: "Where the defendant justifies by custom of foldage, de son tort is a good replication;" citing Kit. 223 a.(b) *Smirke*. The reference is to Yearb. Mich. 5 H. 7, fol. 9 B. pl. 22: that was a case of prescription, not custom.(c)] The authority spoken of in *Crogate's Case*, 8 Rep. 66 b, is derived from the plaintiff: it is impossible to infer such an authority here from the fact of the plaintiff surcharging. *Wells v. Cotterell*, 3 Lev. 48, as was observed from the Bench, cannot be explained by the circumstance of the demurrer having been general, since a general demurrer would, at that time, have raised the objection, as appears from *Fursdon v. Weeks*, 3 Lev. 65, which is commented on by the Court of Exchequer in *Parker v. Riley*, 3 M. & W. 230, 238.

*Smirke* was heard in reply.

*Cur. adv. vult.*

\*Lord DENMAN, C. J., now delivered the judgment of the court. [\*306

This was an action of replevin for distraining the plaintiff's cattle in a place called Gicley Common, to which the defendants pleaded a justification under a custom within a certain forest or chase, called Dartmore, and adjoining unenclosed land, of driving the cattle feeding there to a place called Creber Pound, within and parcel of the place in which, &c., to ascertain if they were rightfully there, and whether any commoners had surcharged the common, and to impound such as were not rightfully there, or a surcharge upon the common. The plea then stated that the plaintiff was a venville tenant, being a freehold tenant of certain lands, and entitled to common for cattle levant and couchant, and justified driving the cattle under the custom, and distraining them damage feasant, because they were not levant and couchant. To this the plaintiff replied, after admitting the seisin of the Prince of Wales alleged in the inducement to the plea, that the defendants of their own wrong, and with-

(a) *Jacobson v. Lee*, 2 Lil. Ent. 349.

(b) Kitchen's Jurisdictions, &c., p. 447, Part III., 5th ed

(c) No question, in that case, seems to have arisen on the replication, which appears to have been put in upon withdrawing a demurrer to the plea.

out the cause assigned, distrained the plaintiff's cattle : and the defendants demurred to the replication, on the ground that the replication *De injuriâ* was inapplicable, that the plaintiff should either have traversed or admitted the custom, and that the justification was by authority of law.

There is no question which has given rise to more discussion in the courts of law than the application of the resolutions in *Crogate's Case*, 8 Rep. 66 b : and it is by no means easy to determine the circumstances  
 \*307] which will \*bring any case within one of these resolutions, and entitle the plaintiff to reply *De injuriâ*.

The general rule, as laid down in *Crogate's Case*, is, that *De injuriâ* may properly be replied when the defendant's plea consists merely of matter of excuse, and of no matter of interest whatever ; but that it cannot be replied where matter of record is parcel of the issue, or where the defendant derives any authority, mediately or immediately, from the plaintiff, and where the defendant, either for himself or for some one whose servant he is, claims an interest, or the defence is founded on authority given by law, or is not in excuse merely, as where the defence is denial, satisfaction, or release.

Upon the argument it was contended, for the defendants, that the custom must be specially traversed or admitted ; that the authority of the defendant was mediately derived from the plaintiff as one of the commoners ; that the defence is founded upon authority of law ; and that the plaintiff ought not by this general replication to oblige the defendants to prove the plaintiff's right of common as alleged.

With respect to the first of these points, and which was most relied upon by the defendants, that the custom should have been specially traversed or admitted, several cases were cited to show that the replication *De injuriâ* to a plea justifying under a custom is bad. *Banks v. Parker*, Hob. 76, 5th ed., and *Bell v. Wardell*, Willes, 202, are express authorities upon this point : and in *Fitch v. Rawling*, 2 H. Bla. 393, and *Selby v. Robinson*, 2 T. R. 758, where the defendants justified under a custom, the  
 \*308] replications in each case traversed \*the custom. But in *Wells v. Cotterell*, 3 Lev. 48, it was held, by a majority of the judges, that the replication *De injuriâ* to a plea justifying under a custom was good.

It is to be observed that in the case of *Banks v. Parker*, the court gave no reason for their judgment : and in *Bell v. Wardell*, the replication was admitted by the plaintiff's counsel to be bad, because it put several different matters in issue, which, according to the later authorities, would not be a sufficient objection if the different matters made up but one defence. The older authorities are not very clear or consistent with each other as to the cases in which *De injuriâ* may or may not be replied : and it was said by Lord C. J. EYRE, in *Jones v. Kitchen*, 1 Bos. & Pull. 76, 80,(a) that *De injuriâ* can only be replied where an excuse is offered for personal injuries.

(a) See *Edmunds v. Pinniger*, 7 Q. B. 558, 568.

The modern authorities, however, have greatly extended the use of the replication *De injuriâ*: and it is now held that, where the plea contains only matter of excuse, and does not fall within any of the exceptions before enumerated, the replication *De injuriâ* is in all cases, whether of tort or contract, to be allowed. The case of *Selby v. Bardons*, 3 B. & Ad. 2, affirmed in error,<sup>(a)</sup> is the leading modern decision upon this point: and, though Lord TENTERDEN differed from the rest of the court, the law upon this point may be considered as now settled, though its application in some instances may not be easy.

\*If the rule, then, be as above stated, there seems no reason why custom may not be included in the general traverse. It is [•309 a mere matter in pais, and not coming within any of the exceptions in *Crogate's Case*. Nor is there any sufficient reason for contending that the defendants' authority was derived from the plaintiff; on the contrary, it is stated to have been derived from the master forester commanding in the name of the lord. Neither is the defence founded on any authority of law, the custom and the warrant not being any authority of law, as settled in *Selby v. Bardons*, and *Crogate's Case*. And, as to the last objection, that the replication obliges the defendants to prove the plaintiff's right of common, that is a difficulty (if any) which they have brought upon themselves by alleging that as a part of the excuse: and the form of the allegation is such as not to involve a seisin in fee, but the fact of the plaintiff being a venville tenant.

The whole plea, in our opinion, contains only matter of excuse, and does not fall within any of the exceptions which would take the case out of the general rule. And it is therefore unnecessary to consider the objections which were taken to the plea itself, as our judgment upon the demurrer to the replication is in favour of the plaintiff.

Judgment for the plaintiff.

(a) *Bardons v. Selby*, 1 C. & M. 500; S. C. 3 Tyrwh. 430; 9 Bing. 756.

END OF MICHAELMAS VACATION.

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**CASES**  
**ARGUED AND DETERMINED**  
**IN**  
**THE QUEEN'S BENCH,**

**IN**  
**Hilary Term and Vacation,**

**IX. VICTORIA.**

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The Judges who usually sat in banc in this Term and Vacation, were

Lord DENMAN, C. J.

COLERIDGE, J.

PATTESON, J.

WIGHTMAN, J.

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**MEMORANDA.**

In last Michaelmas vacation, (see stat. 6 G. 4, c. 95,) *Edwin Sandys Bain*, of the Middle Temple, Esquire, was called to the degree of Serjeant at Law, and gave rings with the motto "*A Deo et Regina.*" And

*Charles Wilkins*, of the Inner Temple, Esquire, was called to the degree of Serjeant at Law, and gave rings with the motto "*Non quo, sed quomodo.*"

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\*311]

\*CHAWNER against CUMMINGS.

Plaintiff, a frame-work knitter, worked as a weaver of gloves for defendant, in frames provided by defendant, at an agreed gross price per dozen pairs. Defendant was a sub-contractor, furnishing the work, by agreement, to a master manufacturer, who found machinery and materials. Defendant settled with plaintiff weekly for the work done, deducting out of the gross price per dozen certain charges, which were according to the known custom of the trade; namely:

1. A frame rent per week.
2. A payment per week for use of defendant's premises to work in, standing room for the frame, defendant's trouble and loss of time in procuring materials and conveying them to plaintiff, defendant's responsibility to the master manufacturer under whom he contracted for the work, superintendence of the work, sorting the goods when made, and delivering them to the master manufacturer.
3. Payments to a boy for winding the yarn; and wear and tear of machinery.
4. A penny per shilling on the net sum earned by plaintiff above 14s. per week, as compensation to defendant for a percent-



age paid by him to the master manufacturer on the amount of goods manufactured by defendant for him with machinery rented of him by defendant. There was no written contract between plaintiff and defendant.

*Held*, that the agreement to pay plaintiff's wages with these deductions was not a contract to pay part of such wages otherwise than in the current coin, within sect. 1 of the Truck Act, 1 & 2 W. 4, c. 37; nor was a contract in writing under sect. 23 necessary to legalize such deductions.

*Held*, also, that there was not in this case any demise of a "tenement" within sect. 23; and, *quære*, whether there was a demise of any thing at a rent thereon reserved, within that clause.

DEBT for work and labour, money had and received, and on an account stated.

Pleas. 1. Never indebted. 2. Payment. Replication, denying payment. Issue thereon. 3. Set-off. Replication, plaintiff not indebted, &c. Issue thereon.

On the trial before COLTMAN, J., at the Leicester Summer assizes, 1844, a verdict was taken for the plaintiff on all the issues, for 3*l.* 16*s.* 3*d.*, subject to the opinion of this court upon the following case. The particulars of demand and of set-off (*a*) were to form part of the case.

\*The plaintiff and defendant are persons engaged in the glove trade, which is a branch of the hosiery manufacture, carried on in the counties of Leicester, Derby and Nottingham. The plaintiff is a workman or artificer, and the defendant is what is termed an undertaker or middle-man. The defendant carries on the business of an undertaker on his own premises, with frames and other machinery belonging to, and rented by him of, a certain master manufacturer residing and carrying on business at the town of Leicester, and with hosiery materials belonging to such master manufacturer. The plaintiff worked as a frame-work knitter in the defendant's employment as a weaver of gloves, in frames provided by the defendant, for about twenty weeks, and was paid for his

(*a*) The particulars of demand claimed a balance of 3*l.* 16*s.* 3*d.* for work done by plaintiff as an artificer, at defendant's glove frames, from December, 1843, to April, 1844. The particulars of set-off were as follows.

18th November, 1843,	} To 3 <i>s.</i> per week for twenty weeks, and to 3 <i>s.</i> 6 <i>d.</i>	£	s.	d.
to				
29th April, 1844.	} for two half weeks, due from plaintiff to defendant,			

used by plaintiff; for standing room; for frames found by defendant for plaintiff; for defendant's trouble and labour of superintendence, and in fetching the yarn from the master and owner; and for commission and reward in respect of the same, and responsibility for the return of the goods; for getting up the manufactured goods, and preparing them in a suitable manner; for taking them into the master's warehouse, and for taking back the manufactured goods to the warehouse of the master and owner for plaintiff - - - - -

3 3 6

To charge for boy winding at frame, at 7*d.* per week, during the above twenty weeks and two half weeks - - - - -

0 12 3

To 1*d.* in the shilling, poundage on the amount of plaintiff's weekly wages above the sum of 14*s.* in the week, agreed to be paid by the plaintiff to the defendant whenever plaintiff's weekly wages were above 14*s.*, as a compensation to the defendant for a percentage, paid by defendant to the owner of the goods and frames employed, on the amount of the goods manufactured by defendant in such frames for such owner - - - - -

0 0 6

£3 16 3

\*313] work, according to the quantity he might \*perform, a certain agreed gross price per dozen pairs of the fingers of gloves, subject to the following charges, to be made by the defendant upon the plaintiff, and which said charges were according to the usual custom : and the settlement was made with the plaintiff at the end of each week for the work so performed ; and the charges so made were deducted out of the gross price per dozen on so settling (namely) :

First. A frame rent or sum of 1s. 6d. per week for the use of the frames furnished by the defendant, and employed by the plaintiff in performing his work.

Secondly. 1s. 6d. per week as a remuneration to the defendant for the use of his premises wherein to perform the work for the defendant, for the standing room for the frame, for his trouble and loss of time in procuring and conveying to the plaintiff the materials to be manufactured, for the defendant's responsibility to the master manufacturer for the due return of the materials when manufactured, for superintending the work itself, for sorting the goods when made, and redelivering them at the warehouse of the master manufacturer.

Thirdly. A sum of 7d. per week for winding the yarn, which is a necessary operation for each workman, and is performed by a child to whom the defendant paid wages 6d. weekly ; the remaining 1d. being to cover the wear and tear and repair of the winding machinery belonging to the defendant.

Lastly. A penny in the shilling on the amount of the plaintiff's weekly earnings above the sum of 14s. in the week, which would remain net after the deduction of the foregoing charges, as a compensation to the defendant for a percentage paid by him to the master manufacturer on \*314] the amount of the goods manufactured by \*the defendant for and by machinery rented by him of such master manufacturer.

The plaintiff was settled with weekly during the time he was so in the defendant's employment, and received the whole amount, less the charges and deductions aforesaid, as specified in the defendant's set-off. The sum for which this action is brought is the total amount of the said charges or deductions which accrued during the period of the plaintiff's employment by the defendant as aforesaid, and are set forth in the statement annexed, (a) and form part of the case.

It has been the established and unvarying usage in the hosiery manufactures in the counties of Leicester, Derby and Nottingham, for a century past, for the employer to let the frames at a rent to the person with

(a) This was headed : "A statement of gross earnings, deductions and net payments (made weekly) to William Chawner, from November 25th, 1843, to April 27th, 1844." The account appeared to be stated weekly, in the following form :

"Nov. 25th. For nine dozen men's B Oxford fingering, at 1s. 7½d. per dozen . . . . .	£	s.	d.
	0	14	7½
Deduct for frame rent 3s., winding, 7d. . . . .	0	3	7
Received . . . . .	0	11	0½

whom he contracts for the manufacture of his materials into goods, and to deduct the amount of frame rent \*from the gross price agreed for working up the materials into goods, upon settling with the workman for the same. The frames are kept in repair by the owners of them at frequent expense. The number of frames in the counties of Leicester, Derby and Nottingham is upwards of 30,000, by far the greater part of which belong to the manufacturers, and for which, therefore, weekly rent is and has been for many years charged; and such rent has been deducted from the gross earnings of the workman on settling with them for their wages, at rates varying according to the kind of frame; and it is admitted that the deductions made by the defendant were made according to the usage of the trade, and that such usage was known to the plaintiff, and he was dealt with accordingly. [\*315]

The legality of these deductions being disputed under the statute 1 & 2 W. 4, c. 37, the action is brought for what the plaintiff contends are the wages against which these deductions were, as the plaintiff now contends, made by way of set-off. There was no written contract between the parties.

If the court should be of opinion that, under the circumstances, the plaintiff was entitled to recover, in this action, the said sum of 3*l.* 16*s.* 3*d.*, or any part thereof, the verdict was to stand to that amount, or for such part thereof as the court should direct: otherwise a verdict was to be entered for the defendant.

The special case was argued in last Michaelmas term and vacation. (a)

*Whitehurst*, for the plaintiff. Stat. 1 & 2 W. 4, c. 37, entitled "An act to prohibit the payment, in certain \*trades, of wages in goods, or otherwise than in the current coin of the realm," recites, in [\*316] sect. 1, that "it is necessary to prohibit the payment," &c. (as in the title,) and enacts: "That in all contracts hereafter to be made for the hiring of any artificer in any of the trades hereinafter enumerated," (of which, by sect. 19, the trade now in question is one,) "or for the performance by any artificer of any labour in any of the said trades, the wages of such artificer shall be made payable in the current coin of this realm only, and not otherwise; and that if in any such contract the whole or any part of such wages shall be made payable in any manner other than in the current coin aforesaid, such contract shall be and is declared

(In some instances there was also a deduction for poundage,)

The statement concluded thus:

\* The result of the above account is as follows.

	£	s.	d.
Gross earnings - . . . . .	14	11	1½
Deductions - . . . . .	3	16	3
Paid in cash - . . . . .	10	14	10½

In this account, the words "frame rent" are stated by the defendant to include the charges first and secondly mentioned in the accompanying case.

(a) November 18th, and December 4th, 1845. Before Lord Denman, C. J., Williams, and Wightman, Js.

illegal, null, and void." Sect. 3 enacts: "That the entire amount of the wages earned by or payable to any artificer in any of the trades hereinafter enumerated, in respect of any labour by him done in any such trade, shall be actually paid to such artificer in the current coin of this realm, and not otherwise; and every payment made to any such artificer by his employer, of or in respect of any such wages, by the delivering to him of goods, or otherwise than in the current coin aforesaid, except as hereinafter mentioned, shall be and is hereby declared illegal, null, and void." Sect. 4 enacts: "That every artificer in any of the trades hereinafter enumerated shall be entitled to recover from his employer in any such trade, in the manner by law provided for the recovery of servants' wages, or by any other lawful ways and means, the whole or so much of the wages earned by such artificer in such trade as shall not have been actually paid to him by such his employer in the current coin of this \*317] realm." Sect. 5 enacts: "That in any action, suit, or other \*proceeding to be hereafter brought or commenced, by any such artificer as aforesaid, against his employer, for the recovery of any sum of money due to any such artificer as the wages of his labour in any of the trades hereinafter enumerated, the defendant shall not be allowed to make any set-off, nor to claim any reduction of the plaintiff's demand, by reason or in respect of any goods, wares, or merchandise had or received by the plaintiff as or on account of his wages or in reward for his labour, or by reason or in respect of any goods, wares, or merchandise sold, delivered, or supplied to such artificer at any shop or warehouse kept by, or belonging to such employer, or in the profits of which such employer shall have any share or interest." And sect. 9 imposes penalties upon employers, in the enumerated trades, who shall "directly or indirectly enter into any contract or make any payment," by this act "declared illegal." The object of these enactments was that the master should pay strictly in coin, and not set off any thing against the wages; and it annuls any payment made otherwise than in the current coin. Here part of the payment is otherwise made; and a set-off is attempted for frame rent, house rent, commission and other matters: the policy of the act is completely infringed; and the mere form of the contract cannot remove the objection. Sect 23 (a) excepts medicines and

(a) Sect. 23 enacts: "That nothing herein contained shall extend or be construed to extend to prevent any employer of any artificer or agent of any such employer from supplying or contracting to supply to any such artificer any medicine or medical attendance, or any fuel, or any materials, tools, or implements to be by such artificer employed in his trade or occupation, if such artificers be employed in mining, or any hay, corn, or other provender to be consumed by any horse or other beast of burden employed by any such artificer in his trade and occupation; nor from demising to any artificer, workman, or labourer employed in any of the trades or occupations enumerated in this act the whole or any part of any tenement at any rent to be thereon reserved; nor from supplying or contracting to supply to any such artificer any victuals dressed or prepared under the roof of any such employer, and there consumed by such artificer; nor from making or contracting to make any stoppage or deduction from the wages of any such artificer for or in respect of any such rent; or for or in respect of any such medicine or medical attendance; or for or in respect of such fuel,

some other \*necessaries from the prohibition of the act, showing [\*318 that, without such express saving, even these could not be supplied in part of wages: but the clause does not include the present case; letting frames is not demising a tenement; and the section provides that the stoppage or deduction in respect of any of the matters excepted shall not be made without contract in writing. Here no such contract exists. Sect. 24 also makes exceptions from the statute, to which the like observations apply. The usage mentioned in the case cannot avail against an act of parliament.

*Hill, contra.* The object of the statute is merely that the workman shall receive full remuneration for his labour: and that is not interfered with in the present case. The deductions made are of sums which never belonged to the workman as part of his wages. The reward for his labour is the net sum after making the deductions. The master employs the middleman \*and allows him certain remuneration, out of [\*319 which the middleman is to find rent for the machinery and wages for the workman, and to repay himself for his labour and responsibility. The gross sum so allowed does not represent wages: if it did, the workman would be paid for that which he does not find. [WILLIAMS, J. Suppose the machine belonged to the workman, and he were paid 1s. 6d. a week for the wear and tear; would not that come to the same thing as the present agreement?] It would. The manufacture is carried on by the man and by the machine, and a payment assigned for the work done by each. The interpretation clause, sect. 25, defines "wages," and states that, "for the purposes of this act, any money or other thing had or contracted to be paid, delivered, or given as a recompense, reward, or remuneration for any labour done or to be done, whether within a certain time or to a certain amount, or for a time or an amount uncertain, shall be deemed and taken to be the 'wages' of such labour." [WIGHTMAN, J. Why do not they agree at once for payment of the net sum?] They do so in effect. The present form is found convenient; and every one understands it. The reason for distinguishing how much is paid for labour and how much for other matters is, perhaps, that some workmen may have machinery of their own, or boys who wind for them. But, if the arrangement were different on these accounts, the workman would receive no more wages than he does now. The clause for payment of poundage if more than 14s. a week be earned will in general be reasonable, because the employer repairs the machinery, and the more work is done the more will repair be needed. Sect. 3 is literally obeyed in this case;

materials, tools, implements, hay, corn, or provender, or of any such victuals dressed and prepared under the roof of any such employer; or for or in respect of any money advanced to such artificer for any such purpose as aforesaid: Provided always, that such stoppage or deduction shall not exceed the real and true value of such fuel, materials, tools, implements, hay, corn, and provender, and shall not be in any case made from the wages of such artificer, unless the agreement or contract for such stoppage or deduction shall be in writing, and signed by such artificer."

\*320] and no attempt is made to infringe sect. 5. As to sect. 23, "it is unsafe to deduce the meaning of a statute from a saving clause. Part of the expressions contain a reservation made only, *ex majori cautela*, for a particular trade ; and part do not apply to the matters here in question. The present custom has been long established ; yet it does not appear to have been contested under any of the former acts (enumerated in stat. 1 & 2 W. 4, c. 36,) against payment of wages in goods. The renting of frames by workmen from their employers is a practice recognised by stat. 28 G. 3, c. 55, s. 1, (preamble.) The effect of a decision for the plaintiff in this case would be only to alter the form of contracts, the transaction being in its nature innocent.

*Whitehurst*, in reply. As to the statute last cited ; there is no doubt that the master might let frames to his workmen, as he might sell goods, if he first paid the full wages, and then received rent, or the price of goods, out of them. In that case the whole wages would for a time be the workman's money. The argument on the other side is that the middleman receives a gross sum from the master manufacturer for the whole cost of producing a given quantity of goods. But the case does not show what the master here pays to the middleman : and the bargain for frame-rent and standing room is no part of the contract for production of any quantity of glove fingers. They are taken at so much per dozen of pairs ; but the charge per week for frame and standing rent is a deduction from the wages when paid, whether any thing has been earned for glove fingers during the particular week or not. The 1*d.* in the shilling is distinctly claimed as a poundage, and has no connection with any means furnished

\*321] for producing the \*article : and for this deduction alone the plaintiff is entitled to recover under sect. 4 of stat. 1 & 2 W. 4, c. 37. The act must be construed according to its policy, which was to extend and render more certain the provisions which had been contained in former acts. The anxiety of the legislature to prevent all evasions is shown by the enactment in sect. 25, "that within the meaning and for the purposes" of this act "any agreement, understanding, device, contrivance, collusion, or arrangement whatsoever on the subject of wages, whether written or oral, whether direct or indirect, to which the employer and artificer are parties or are assenting, or by which they are mutually bound to each other, or whereby either of them shall have endeavoured to impose an obligation on the other of them, shall be and be deemed a 'contract.'"

*Cur. adv. vult.*

Lord DENMAN, C. J., in this term, (January 22*d.*,) delivered the judgment of the court.

The plaintiff in this case is an "artificer" and the defendant an "employer," within the meaning of the statute 1 & 2 W. 4, c. 37, though it is stated in the case that he (defendant) rents the knitting-frames from a master manufacturer, and has the materials also to be worked up from him, and is therefore called an "undertaker." The action is brought to



recover a certain amount of "charges and deductions" from his wages, such charges and deductions, as alleged on behalf of the plaintiff, being prohibited by the said statute, and therefore recoverable. And, if the said charges and deductions be within such prohibition, they are so recoverable, because, by the fourth section, the plaintiff would be entitled to recover "in the manner by law provided for \*the recovery of servants' wages;" and therefore the count for work and labour is the appropriate remedy. Further, to clear the case of points in which there is no difficulty, we have no doubt but that, if the said charges and deductions be illegal, they are not available for the defendant in the shape of set-off, the fifth section being express upon this subject. [\*322]

The plaintiff was employed by the defendant as a frame-work knitter, that is, as a weaver of gloves, in frames provided by the defendant, and paid, according to the quantity of work he might perform, a certain agreed gross price per dozen pairs of the fingers of gloves, subject to the same charges and deductions upon which the question arises. It is admitted that they were made according to the usage of the trade, and that such usage was known to the plaintiff, and that he was dealt with accordingly. It further appears that "it has been the established and unvarying usage," in the important district where the hosiery manufacture prevail, for the employer to let the frame to the artificer, and to deduct the rent from his earnings; and that of 30,000 frames (the estimated number in that district) *by far the greater part* belong to the manufacturers, and are let out at a rent, as above mentioned.

In order to form a correct judgment upon the nature of this agreement and of these deductions, it is necessary to attend to the provisions of the act with some particularity. It was directed, as is well known, against what has been called generally the *truck system*, or, as the title of the act is, against the payment of wages in certain trades in goods, or otherwise than in the current coin of the realm. The prohibition extended to bank notes, because the eighth section expressly legalizes \*payment by [\*323] them under certain circumstances. The same purpose is declared in the preamble, and in the same terms, and is pursued in the earlier sections of the act. The first section declares all contracts illegal, where the wages are made payable in any other manner than in the current coin. The second section avoids all contracts where there is any provision as to the place or manner in which the wages, or any part, are to be expended. Section 3 makes all payments, except as aforesaid, illegal and void: and the fourth section contains the proviso already referred to, that the artificer may recover his wages as if such prohibited payments had not been made: and the fifth section, also before noticed, takes away the right of set-off in such cases. Now it is to be observed that *payment* otherwise than in money is alone prohibited. Deductions or charges are nowhere mentioned or alluded to before the twenty-third section, hereinafter to be considered. Then, are these deductions in the

nature of payment at all? It seems to us to be the mode of calculating the amount of wages, and nothing more. Whether the arrangement took place at the beginning or end of the work makes no difference; because it is stated that the deductions were made according to the usage of the trade, and that the plaintiff knew it, and was dealt with accordingly. The plaintiff, therefore, must be presumed to have contracted upon the usual and well-known terms; and his wages, so ascertained, have been actually received by him in the current coin of the realm.

Into the particular nature of these several deductions it is perhaps not needful to enter with any minuteness, as they are all said to be according to the usage of the trade, and none is stated to be colourable, or intended \*324] \*to take undue advantage of the workmen. The two first, and by far the largest, items, (amounting to 3*l.* 3*s.* 6*d.* out of 3*l.* 16*s.* 3*d.* which is the whole demand,) the charge for frames and standing room, are obvious enough. Although, if the frames and standing for them had been his own, the plaintiff's earnings would have been apparently higher, it would have been apparently only, because the cost price of the frames and the expense of repair and additional rent must all be really deducted. The same observation applies to the third item, 12*s.* 3*d.* for a boy winding, that being (as stated) a distinct operation; and the plaintiff, therefore, must either have lost his own time in doing it, or paid for getting it done; and nothing excessive is insinuated as to the amount. The most objectionable perhaps, because the least intelligible, item is the last, amounting, however, only to the sum of 6*d.* That is a charge of 1*d.* in a shilling when the weekly wages of the plaintiff exceed 14*s.*, as a compensation to the defendant for a per centage payable by him to the owner of the frames and goods on the amount of goods manufactured, and of the frames so employed. Considering, however, the amount, it may be enough to say that this deduction also is according to the usage of trade; and, as nothing is stated as to the unreasonableness of it in the case, the court perceives no sufficient reasons for pronouncing it to be unreasonable.

We have already observed that the earlier parts of the act, up to the twenty-third section, respect the payment of wages in goods or otherwise than in the current coin. But this twenty-third section was relied upon in argument on behalf of the plaintiff, as showing that the statute includes \*325] other transactions, and amongst the rest \*deductions for *rent*, and that none such are allowable except the contract be in writing, which was not the case here. It is thereby declared that nothing in the said act contained shall prevent the employer from supplying an artificer with divers articles therein enumerated, (not material to the present purpose,) "nor from demising to any artificer" "the whole or any part of any *tenement at any rent to be thereon reserved*;" nor from making "any stoppage or deduction from the wages of any such artificer for or in respect of any such rent," provided that such stoppage or deduction shall

not exceed the "true value of such fuel, materials, tools, implements, hay, corn, and provender," (*not* including *rent*,) "and shall not be in any case made from the wages of such artificer, unless the agreement or contract for such stoppage or deduction shall be in writing, and signed by such artificer."

Upon the construction of this clause, first, it may be doubted whether there has been any "demise" of any thing "at a rent thereon reserved:" next, there is nothing to show that there has been a demise "of the whole or any part of any *tenement*," the conventional phrase "frame rent," which is used in the case, being wholly insufficient to establish that fact: and, lastly, as has been already noticed, the proviso which requires a contract in writing in order to legalize a stoppage or deduction does not include rent. We are of opinion, therefore, that this section does not affect the question; and that upon the whole our judgment must be for the defendant.

Judgment for defendant.

### \*PAINE against The Guardians of the Poor of the STRAND [326 Union.

The guardians of a poor-law union cannot bind themselves by an order, not under seal, for making a survey and map (according to stat. 6 & 7 W. 4, c. 96, s. 3,) of the ratable property in a parish forming part of the union: for such order is not a contract necessarily incident to the purposes for which the guardians are made a corporation by stats. 5 & 6 W. 4, c. 60, s. 7, and 5 & 6 Vict. c. 57, s. 16: and it is not intended by stat. 6 & 7 W. 4, c. 96, s. 3, that the guardians of a union should make themselves liable for the expenses of such plan. Nor can such guardians bind themselves by a contract without seal, (if they can in any manner contract,) to remunerate a surveyor for attending as a witness on appeal against a parochial assessment within the union.

ASSUMPSIT for work and labour, care, diligence, services, journeys and attendances, for materials, for goods sold and delivered, and on an account stated.

Pleas. 1. Non assumpsit. Issue thereon. 2. Payment and acceptance: verification. Replication denying the payment, &c. Issue thereon.

On the trial, before PATTESON, J., at the Middlesex sittings in Michaelmas term, 1844, it appeared that the plaintiff was a surveyor, and that the Guardians of the Strand Union, in November, 1841, contracted with him, by agreement under seal, to survey for them the property in the parish of St. Clement Danes in the Strand Union, liable to poor-rate, and to make a plan and valuation (a) of the said property, with a book of

(a) The agreement recited that the Poor-law Commissioners had ordered such survey, plan and valuation to be made, and that the guardians had appointed the plaintiff to make them.

The Parochial Assessment Act, 6 & 7 W. 4, c. 96, s. 3, enacts: "That when it shall be made to appear to the Poor-law Commissioners by representation in writing from the board of guardians of any union or parish under their common seal, or from the majority of the churchwardens," &c., "that a fair and correct estimate for the aforesaid purposes," (see ss. 1 & 2,) "cannot be made without a new valuation, it shall be lawful for the Poor-law Commissioners, where they shall see fit, to order a survey, with or without a map or plan, on such

\*327] \*reference ; (the plan to be approved of by the guardians, the Poor-law Commissioners and the Tithe Commissioners,) and to make and deliver to the guardians a duplicate of the plan within one month after it should have been approved of by the Poor-law Commissioners. It was also a part of that agreement that, if either or both of the first two poor-rates for St. Clement Danes, to be made on the said valuation, should be appealed against on the ground of irregularity, unfairness or incorrectness in the valuation, &c., the plaintiff would, on three days' notice from the defendants or the overseers of the parish, attend before the justices at special or petty sessions, and at the general or quarter sessions or any adjournment thereof, as often and as long as the matter of such appeal should be heard, and give evidence on the matter of such objection, without being paid or demanding any fee, reward, or compensation from the guardians, churchwardens or overseers for such attendance, and without charging any expenses arising therefrom.

The plaintiff made and delivered the survey, plan, &c., according to the agreement : they were submitted to the Poor-law and Tithe Commissioners ; and it was \*328] \*suggested, by a communication from the Poor-law Commissioners to the guardians, that an outline map on a reduced scale should be prepared, showing the relative position of the several parts into which the parish of St. Clement Danes appeared by the plan to be divided. The vestry clerk, on behalf of the guardians, communicated that desire to the plaintiff ;(a) and he prepared and delivered to the vestry clerk the reduced copy, for which he charged 8*l.* 8*s.* This formed no part of the work stipulated for in the agreement.

The plaintiff attended at sessions on appeals against the first two poor-rates made after the valuation. The guardians were of opinion that the agreement under seal did not take effect as to attendances at sessions till the valuation, plan, &c., should be approved of by the Poor-law Commissioners ; and they disclaimed the above-mentioned attendances : but, after the approval of the Commissioners had been obtained, they required the plaintiff to attend special sessions, in pursuance of the agreement,(b) on scale as they shall think fit, to be made and taken of the messuages, lands, and other hereditaments liable to poor-rates in such parish, or in all or any one or more parishes of such a union, and a valuation to be made of the said messuages, lands, and other hereditaments, according to their annual value, and to direct such guardians to appoint a fit person or persons to make and take every such survey, map or plan, and valuation, and to make provision for paying the costs of every such survey, map or plan, and valuation, either by a separate rate or by a charge on the poor-rates, as they may see fit ; but in case of such charge being made, then provision shall be made for paying off not less than one-fifth of the sum charged on the rates, and such interest as may from time to time be payable in respect of such charge or any part thereof, in each succeeding year, till the whole is repaid."

(a) The letter was as follows : "I am directed by the Board of Guardians to call your immediate attention to the accompanying copy of a report furnished by Captain Dawson of the Tithe Commission office to the Poor-law Commissioners ; and I am to inform you that any corrections you may be desirous of making in the plans must be made only at this office, the board not feeling warranted in parting with the plans after the payment made. I am," &c.

(b) Notice was served, beginning as follows : "Notice is hereby given," &c., "that you are required by the Guardians," &c., "personally to attend, pursuant to the provisions con"

appeals against the rates ; such rates being the first and second after the approval, but not the first or second after the actual making and delivery of the valuation. The plaintiff replied, by letter, that his attendance must be without prejudice to his right of remuneration : and he attended, but charged the defendants 12*l.* 12*s.* in his particular of demand for "attending appeals at the Sessions, Surrey Street, since the second rate made upon the valuation prepared by the plaintiff." [\*329]

The plaintiff's demand for the reduced plan, &c., and attendances, and on other accounts, was 42*l.* 10*s.* 6*d.*

It was objected at the trial : 1. That the contract for the reduced plan was not comprehended in the original agreement, and therefore did not bind the guardians, who, being a corporation, could not make such a contract otherwise than under seal. 2. That the same objection applied to the attendances at sessions, if they were not given under the agreement ; and that, on the true construction of that instrument, they were not so given : and, further, that neither a corporation nor any other party could be bound by contract to give compensation for the attendance of a witness, beyond the ordinary allowance for expenses. The learned judge was of opinion that the guardians had misconstrued the agreement, and that the latter attendances had not been given under it. He also thought that the reduced plan was no part of the subject-matter of the agreement. He reserved the other points, and left it to the jury to say whether the reduced plan had been made, and the attendances now in question given, at the request of the guardians, for a compensation, and what compensation was reasonable. The jury thought the plaintiff entitled to recover on both demands. Verdict for plaintiff ; damages (assessed in separate sums) 23*l.* 2*s.*

*Platt*, in the ensuing term, obtained a rule to show \*cause why a new trial should not be had, or (according to leave reserved) why a nonsuit should not be entered. In Michaelmas vacation, 1845, (a) [\*330]

*Willmore* showed cause. First, the guardians may be sued by that name, but are not such a corporation as may exempt itself from liability on contracts not under seal. Stat. 5 & 6 W. 4, c. 69, s. 7, (b) enacts

tained in a certain contract in writing entered into between you and the said guardians, bearing date," &c., "at a special session," &c., "to be held," &c., "and at any and every adjournment of such special session, and give evidence," &c.

(a) December 9th. Before Lord Denman, C. J., Patteson, and Wightman, J.

(b) Stat. 5 & 6 W. 4, c. 69, "to facilitate the conveyance of workhouses and other property of parishes and of incorporations or unions of parishes in England and Wales," enacts as follows :

Sect. 7. "And for the more easy execution of the purposes of this act, and of the laws relating to the poor, be it enacted, that the guardians of the poor of every union already formed or which hereafter shall be formed by virtue of the aforesaid act," (4 & 5 W. 4, c. 76,) "and of every parish placed under the control of a board of guardians by virtue of the said act, shall respectively from the day of their first meeting as a board become or be deemed to have become, and they and their successors in office shall for ever continue to be, for all the purposes of this act, a corporation, by the name of the Guardians of the poor of the union (or of the parish of ) in the county of ; and as such corporation the



that the guardians of every Union shall "from the day of their first meeting as a board become or be deemed to have become, and they and their successors in office shall for ever continue to be, for all the purposes of this act, a corporation." The purposes are those pointed out by the title of the act, which is passed "to facilitate the conveyance of workhouses and other property of parishes" and Unions. Sect. 7 goes on to \*331] enact that "as such corporation" the guardians are empowered "to accept, take, and hold" lands, &c., for the benefit of such union or parish, to "use a common seal," and by their corporate name to bring and defend actions. It would not have been necessary to specify these incidents, if they had been made a corporation for all purposes. Stat. 5 & 6 Vict. c. 57, s. 16,(a) contains similar provisions, leading to the same inference. [PATTESON, J. The former statute, s. 7, enacts that, "for the more easy execution of the purposes of this act, and of the laws relating to the poor," the guardians, as a corporation, may take lands and use a seal, and that they may sue and be sued in respect of property before described, or any bonds, contracts, securities or instruments given or to be given to them.] It is said that they "are further empowered by that name" (not as a corporation) "to sue and be sued," &c. When it was suggested, in *Mayor of Ludlow v. Charlton*, 6 M. & W. 815, 819, that "actions may be maintained against a board of guardians," ROLFE, B., said: "They are only corporations for particular purposes."

Secondly, assuming the defendants to be such a corporation as may allege that its contracts ought, ordinarily, to be under seal, the defence is not open in the present case. These are contracts, for a small \*332] pecuniary consideration, actually executed, on the request of the guardians; the plan and valuation, at least, were things within the ordinary scope of their business; and the reduced plan was subsidiary to these. The preparing of such documents, when wanted, was among the matters of daily necessity in the affairs of a corporation, which may be contracted for without seal. The case, therefore, is within the authority of *Beverley v. Lincoln Gas Company*, 6 A. & E. 829; *Church v. Imperial Gas Company*, 6 A. & E. 846; and *De Grave v. Mayor, &c., of Monmouth*, 4 Car. & P. 111. The case (cited in making this motion) of *Arnold v. The Mayor of Poole*, 4 Man. & G. 860, differed materially:

said guardians are hereby empowered to accept, take, and hold, for the benefit of such union or parish, any buildings, lands, or hereditaments, goods, effects, or other property, and may use a common seal; and they are further empowered by that name to bring actions, to prefer indictments, and to sue and be sued, and to take or resist all other proceedings for or in relation to any such property, or any bonds, contracts, securities, or instruments given or to be given to them in virtue of their office."

(a) Stat. 5 & 6 Vict. c. 57, "To continue until the 31st day of July, 1847, and to the end of the then next session of parliament, the poor-law commission; and for the further amendment of the laws relating to the poor in England," enacts:

Sect. 16. "That it shall be lawful for every board of guardians constituted under the said first recited act" (4 & 5 W. 4, c. 76) "to accept, take, and hold, on behalf of the union or parish respectively for which they may act, any lands, buildings, goods, effects or other property as a corporation, and in all cases to sue and be sued in their corporate name."



the sum claimed was large, and the transactions not in the common course of business. The same observations apply to *Mayor of Ludlow v. Charlton*, 6 M. & W. 815. The exceptions to the rule requiring a sealed contract were fully admitted by the Court of Common Pleas in *The Fishmongers' Company v. Robertson*, 5 M. & G. 131, though the business done in that case did not fall within them.

Thirdly, the action lay for attendances at the sessions. The guardians, in their agreement, had recognized such attendances as being a subject of compensation but for the express stipulation therein made; and, after that had ceased to operate, they must be taken to have impliedly promised compensation when they required further attendances. In *Collins v. Godefroy*, 1 B. & Ad. 950, (a) it was held that remuneration for loss of time in attending as a witness could not be recovered in an action; but there the plaintiff had been subpœnaed and was bound to attend; and the decision turned on that fact. But the case is different where the witness is under no compulsion to attend. Attorneys and medical men have always had a remuneration for their loss of time in appearing as witnesses. And in *Loneragan v. The Royal Exchange Assurance*, 7 Bing. 729, it was held that the prothonotary might allow in taxation the charges of a witness who, being out of England, could not be subpœnaed, and who refused to attend unless his expenses were paid. [PATTESON, J. The decision of special sessions on appeal against a rate is conclusive, by stat. 6 & 7 W. 4, c. 96, s. 6, if not appealed against at Quarter Sessions: there must be some mode of compelling attendance at such a court, independently of any contract.] Sect. 70 of stat. 7 & 8 Vict. c. 101, (which incorporates by reference, (b) stat. 6 & 7 W. 4, c. 96,) gives a proceeding by summons for this purpose. (*Pashley*, for the defendants, referred to *Regina v. Greenaway*, 7 Q. B. 126, as showing that a Crown office subpœna might issue.) The guardians did not rely upon a subpœna, but required attendance as under the contract: the plaintiff went accordingly; and they availed themselves of his evidence. [WIGHTMAN, J. He was not obliged to go when the notice called upon him to attend under the contract; that is, for nothing.] It seems to be the result of the cases that a party not actually compelled by subpœna may insist on being paid if he attends, and charge for his attendance. But, if the opinion of the court is against the plaintiff on this point, it will not be insisted upon. The damages are assessed separately.

\**E. V. Williams* and *Pashley*, contra. First, the defendants are, for general purposes, a corporation. Stat. 5 & 6 W. 4, c. 69, s. 7, gives them the incidents of one; successors, a common seal, and a corporate name. Some superfluous words ("for the more easy execution," &c.) which are added cannot control the substantive enactment. The doctrine as to the creation of a body corporate by implication is

(a) See *Bentall v. Sydney*, 10 A. & E. 162.

(b) See sect. 74, and stat. 5 & 6 Vict. c. 57, s. 18.

explained by *The Case of Sutton's Hospital*, 10 Rep. 23 a, 30 b, and *The Conservators of the River Tone v. Ash*, 10 B. & C. 349. (a)

Secondly, assuming that the defendants are, in the general sense, a corporation, they could not contract by parol for the work and services in question, because the contract did not relate to a purpose for which the corporation was created. In this respect the case differs from *Beverley v. Lincoln Gas Company*, 6 A. & E. 829, where, though the court intimated generally that a corporation "may be a party to an agreement not under seal, at least for the purpose of suing on it; and it would be rather strong to deny, at the same time, that it could be a party to it for the purpose of being sued on it," (b) (a proposition going farther than was necessary, and not borne out by the authorities,) yet they finally gave judgment on the ground that the contract before them was essential to the purposes for which the corporation was created. This seems to have been considered the principle of the decision when it was referred to in *Church v. Imperial Gas Company*, 6 A. & E. 846, 859, and in *Gibson v. East India Company*, 5 New C. 262, 270; and the rule of law \*laid down in

\*335] the latter case was limited accordingly. Preparing a plan with a view to the proper assessing of a poor-rate is not essential to the purposes of a board of poor-law guardians: it forms no part of their general duties, though they are required to prepare such plan if called upon, under a particular enactment. The Court of Exchequer, in *Mayor of Ludlow v. Charleton*, 6 M. & W. 815, expressly recognises the doctrine, stated in *Church v. The Imperial Gas Company*, 6 A. & E. 861, that the rule forbidding corporations to contract without seal is subject to exceptions on the principle of "convenience, amounting almost to necessity," where its application "would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created:" and, in the former case, Rolfe, B., delivering the judgment of the court, adverted to the corporations established in modern times for the purpose of carrying on speculations in trade, and said: (c) "Where the nature of their constitution has been such as to render the drawing of bills, or the constant making of any particular sort of contracts necessary for the purposes of the corporation, there the courts have held that they would imply in those who are, according to the provisions of the charter or act of parliament, carrying on the corporation concerns, an authority to do those acts, without which the corporation could not subsist. This principle will fully warrant the recent decision of the Court of Queen's Bench in *Beverley v. Lincoln Gas Light and Coke Company*, 6 A. & E. 829." The principle, however, is inapplicable to the present case. Similar language was used

\*336] by the Court of Common Pleas in *Arnold v. the Mayor of Poole*, 4 M. & G. 860, 895, where the doctrine of *Mayor of Ludlow v. Charleton*, 6 M. & W. 815, was referred to and adopted. Nor was it

(a) See *Jefferys v. Gurr*, 2 B. & Ad. 833. Also Yearb. Hil. 2 H. 7, fol. 13 A. pl. 16.

(b) P. 839.

(c) 6 M. & W. 821.

departed from in *The Fishmongers' Company v. Robertson*, 5 M. & G. 131. That case did not proceed upon the ground that a corporation is liable on a contract if executed, which could not be enforced if executory (a distinction taken in *East London Water Works Company v. Bailey*, 4 Bing. 283, but rejected in *Church v. Imperial Gas Company*, 6 A. & E. 860, and several other cases :) the ground of decision was, that the defendants, having received the benefit of the contract at the hands of the corporation, could not, when sued upon it by them, allege that it was not mutually binding, and that the corporation would not have been legally liable upon it at the suit of the defendants. TINDAL, C. J., said there: (a) "The cases referred to on guarantees (see particularly the judgment in *Kenneway v. Treleavan*, 5 M. & W. 498, 501,) and in the Statute of Frauds, where the contract has been signed by the defendant only, and not by the plaintiff, but allowed to be enforced by action, notwithstanding the objection of a want of mutuality, tend strongly to support the principle on which we consider the present action maintainable." The only point in which this court has differed from the others on the present subject has been by ascribing (in *Beverley v. Lincoln Gas Company*, 6 A. & E. 829, 839) the liability of corporations to reciprocal obligation, in a manner which the other authorities do not sanction. The case of guarantee shows that such reciprocity is not essential. The party taking a guarantee for goods to be supplied need not bind himself to supply them. [PATTERSON, J. There is a suspended contract on his part. He is not obliged to furnish the goods; but the contract of guarantee cannot come into operation till he has done so. Lord DENMAN, C. J. There is a provisional mutuality. WIGHTMAN, J. It is, If you supply, I will be responsible.] The question here is, strictly, whether the case is brought within any of the exceptions to the general rule as to contracts by corporations: and the only one that could be supposed applicable is that which allows parol contracts for things essential to the purposes of the corporation. [WIGHTMAN, J. Do not you put this too narrowly? TINDAL, C. J., in *Gibson v. The East India Company*, 5 New Ca. 270, speaks of the modern exceptions as established where the contract is one of which the allowance is necessary for, "or incidental to," the purposes of the corporation. The law is not so laid down in *Mayor of Ludlow v. Charlton*, 6 M. & W. 821, 822, or *Arnold v. the Mayor of Poole*, 4 M. & G. 895; *Church v. Imperial Gas Company*, 6 A. & E. 861, and other leading cases. (b) Almost any act of a board of guardians may be deemed incidental to the purposes of their appointment. But the making of surveys and maps is an object quite beside their original and regular func-

(a) 5 M. & G. 195.

(b) Pashley cited, as illustrating this part of the subject, (in addition to the cases mentioned in the text,) the judgment of this court in *Yarborough v. The Bank of England*, 16 East, 6; *Broughton v. The Manchester Waterworks Company*, 3 B. & Ald. 1; *Manby v. Long*, 3 Lev. 107; *Rex v. Bigg*, 3 P. Wms. 419; 2 Kent's Commentaries, 290, 291, and note (b), *ibid.* and 292; (ed. New York, 1840.) See also *Hall v. The Mayor, &c., of Swansea*, 5 Q. B. 526.

tions; and stat. 6 & 7 W. 4, c. 96, s. 3, requires this to be done under the direction of the Poor-law Commissioners, after the guardians (if they  
 \*338] interfere \*in such matter) shall have certified under their common seal that the work is necessary. [PATTERSON, J. By sect. 3, a rate is to be laid for paying the expenses. It seems difficult to say that any thing for which they may require a rate is not essential for the purposes of their incorporation.] It cannot therefore be assumed that they may, at their discretion, give an order for such a thing without affixing their seal. By sect. 3 the legislature seems to contemplate that the maker of the survey shall not bring an action at all, but shall be paid in the manner there pointed out. [PATTERSON, J. That was suggested at the trial; but I thought it could hardly have been meant that his remedy should be confined to a process running over five years.] If the guardians are to become liable in an action, the legislature must be taken to intend that they shall become so by the ordinary means applicable to the state of things created by the statute; *Murray v. The East India Company*, 5 B. & Ald. 204, 210. [Lord DENMAN, C. J., mentioned *De Grave v. The Mayor, &c., of Monmouth*, 4 Car. & P. 111.] That case is inconsistent with *Arnold v. The Mayor of Poole*, 4 M. & G. 860;(a) and the correctness of the ruling may be questioned.

The expenses of attendance at sessions cannot be claimed. [PATTERSON, J. The plaintiff might have refused to attend without payment or an undertaking by deed.] (The court declined to hear this point further argued.) *Cur. adv. vult.*

Lord DENMAN, C. J., in the vacation after this term, (February 12th,) delivered the judgment of the court.

\*339] \*This was an action of assumpsit for work and labour, to which the defendants pleaded the general issue. At the trial, it appeared that the defendants, who are a corporate body by stats. 5 & 6 W. 4, c. 69, s. 7, and 5 & 6 Vict. c. 57, s. 16, had, by direction of the Poor-law Commissioners under stats. 6 & 7 W. 4, c. 96, s. 3, proceeded to make a survey and map of the parish of St. Clement Danes, one of the parishes comprised in the Strand Union. An agreement under seal was entered into between the defendants and the plaintiff for making such plan and survey; and they were accordingly made: but afterwards it became desirable that a reduced plan should be made; for which a verbal order, not under seal, was given to the plaintiff.

The action was brought for the price of such reduced plan, and also for the attendances of the plaintiff as a witness at some special sessions of justices. At the trial it was objected that the order for the reduced plan, not being under seal, was not binding on the defendants by reason of their corporate character; that the same objection applied to the attendances before justices; and, further, that no person was by law entitled to compensation for such attendance in any case. The objections were

(a) See *Regina v. Mayor of Stamford*, 6 Q. B. 433.

overruled, leave being given to move for a nonsuit: and the jury found a verdict for the plaintiff for separate sums on each demand. A rule nisi for a nonsuit having been obtained, the demand for attendances was, upon cause being shown, abandoned: and the sole question now for consideration relates to the demand for the reduced plan.

The general rule is not denied, that, in order to make a contract binding upon a corporate body, it must be under seal. To this rule, however, there are no doubt \*some exceptions: and several cases were [\*340 cited upon the argument to show that the present case comes within the principles on which such exceptions rest. Perhaps the case which went farthest is that of *Beverley v. Lincoln Gas Company*, 6 A. & E. 829, which, however, will be found, on examination, to be within the exceptions which have been uniformly laid down. The reason for the general rule, and the propriety of adhering to it, are fully explained in the judgment of the Court of Exchequer in the case of *The Mayor of Ludlow v. Charlton*, 6 M. & W. 815, in which that court expressed its full concurrence with this court in respect to the exceptions to the rule as stated in *Church v. Imperial Gas Company*, 6 A. & E. 846. And the same law was laid down by the court of Common Pleas in *Arnold v. The Mayor of Poole*, 4 Man. & G. 860, and *The Fishmongers' Company v. Robertson*, 5 Man. & G. 131.

Now, if the present case be within any exception to the rule, it must be that which excepts contracts which are necessarily incident to the purposes and objects for which the corporation was created, as the drawing and accepting bills to a trading company, or the purchase of coal and machinery to a gas company. Let us then try this contract by such criterion. The defendants are incorporated for the purpose of managing and conducting the relief and maintenance of the poor within several parishes formed into a Union. The expenditure of the money collected for these purposes is intrusted to them; but they have nothing to do with the making rates on the respective parishes, or collecting them when made. \*The plan in question was ordered by the Poor-law Commissioners [\*341 under the third section of stat. 6 & 7 W. 4, c. 96, on the representation of the defendants, at the request of the parish of St. Clement Danes. This was not quite regularly done under that act; for it is plain that the representation ought to have been made direct by the parish authorities to the Poor-law Commissioners. The plan was wanted in order to enable a fair and correct estimate to be made of the net value of the hereditaments rated in that parish: the other parishes in the Union had nothing to do with it, nor were in any way benefited by it; so that the making the plan cannot have been in any way incident to the purposes for which the defendants were incorporated, which purposes related to the whole Union; the defendants having no power to act as a corporation in matters confined to any particular parish.

The same third section provides for the mode in which the costs of such

survey and plan shall be paid ; which, perhaps, is not very easy to understand : but it is plain that the legislature did not intend the guardians of the Union to make themselves liable for the amount.

Under these circumstances, we are of opinion that this case is not within the exceptions to the general rule as to contracts by bodies corporate, and that the rule for nonsuit must be made absolute. Rule absolute.

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**\*342]** **\*HAYNE** against **RHODES** and Others. *Monday, January 12th.*

Declaration alleged that plaintiff, at request of defendants, retained and employed them as attorneys, for fees, &c., to use due care in ascertaining the title of R. to lands, which were to be charged as security for payment of 600*l.* by R. to plaintiff, and to take due care that the same should be a sufficient security for payment of the 600*l.* by R. to plaintiff; and, in consideration, &c., defendants promised plaintiff to use due care and diligence in and about ascertaining the title of R. to the lands, and to take due care that the same should be a sufficient security for such repayment of the 600*l.* by R. to plaintiff.

*Held*, that the undertaking of the defendants, as laid, did not comprehend any inquiry into the value of the lands.

**ASSUMPSIT.** The declaration stated that, before the making of the promise, to wit, on, &c., one George Ross had projected, and had then begun to form, a joint-stock company, to wit, the Holborn Improvement Company, and had then given public notice that he then proposed and intended, for and on behalf of the said Company, to apply to Parliament, in the then next session, (3 & 4 Vict.,) for an act to enable the said Company to carry into effect the objects of the said Company, to wit, &c. That G. Ross was thereupon afterwards, to wit, on, &c., authorized by the said company, subject to confirmation by their provisional Committee of management, to nominate and appoint a secretary to the company. That it was thereupon then proposed by G. R. that he should, subject to confirmation, &c., nominate and appoint plaintiff secretary at a certain salary, to wit, 400*l.* per annum, to commence from the day and year aforesaid, payable quarterly, and that, for and in consideration of such nomination and appointment, and provided the same should be confirmed, &c., plaintiff should pay and advance to G. R., with the privity and consent and for the benefit and profit of the company, a large, &c., to wit, the sum of 600*l.*, to be repaid and returned by G. R. to plaintiff in case such act should not be obtained in one or other of the two next sessions of parliament, to wit, 3 & 4 Vict. or 4 & 5 Vict., less the excess, if any, above

**\*343]** 600*l.*, which should, \*at and after the expiration of certain notice to be given by plaintiff to G. R. as in the declaration mentioned, have been received on account of such salary as aforesaid by plaintiff, together with a sum equal to 5*l.* per cent. interest on the money to be so repaid, computed from 28th January, 1840 ; and that, as a security for the repayment of the said sum of 600*l.* by the said G. R. to plaintiff in case such act as aforesaid should not be obtained in one or other of the



aforesaid sessions, &c., less the excess, &c., G. R. should charge and encumber certain lands, tenements and premises of the said G. R. situate in Somersetshire.

And thereupon afterwards, to wit, on, &c., plaintiff, at the request of defendants, retained and employed defendants as the attorneys of and for the plaintiff, for fees and reward to them in that behalf, “to use due and proper care in ascertaining the title of the said G. R. to the said lands, tenements and premises, *and* to take due and proper care that the same should be a sufficient security for the repayment of the said sum of 600*l.* by the said G. R. to the plaintiff, in case such act of parliament as aforesaid should not be obtained within one or other of the aforesaid sessions of parliament, less the excess,” &c.; and, in consideration of the last-mentioned premises, defendants then promised plaintiff “to use due and proper care and diligence in and about ascertaining the title of the said G. R. to the said lands and tenements and premises, *and* to take due and proper care that the same should be a sufficient security for such repayment of the said sum of 600*l.* by the said G. R. to the plaintiff” in case such act should not be obtained in one or other of the aforesaid sessions, less the excess, &c.

\*Nevertheless defendants, not regarding their duty, &c., nor the said promise, “did not nor would take due and proper care in [•344 and about ascertaining the title of the said G. R. to the said lands, tenements and premises, nor take due or proper care that the same should be a sufficient security for the repayment of the said sum of 600*l.* by the said G. R. to the plaintiff” in case such act should not be obtained in one or other of the aforesaid sessions, less the excess, &c. Averment, that G. R. did afterwards, to wit, on, &c., subject to confirmation, &c., nominate and appoint plaintiff secretary to the said company at such salary as aforesaid, to wit, &c., (salary of 400*l.* per annum, to commence, &c.,) and that such last-mentioned nomination and appointment were then, to wit, on, &c., duly confirmed, &c., upon the terms and in manner last aforesaid. That plaintiff, confiding, &c., did then, to wit, on, &c., pay and advance to the said G. R., with the privity and consent, and for the benefit and purposes, of the company, the said sum of 600*l.*, to be repaid and returned by G. R. to plaintiff in case such act should not be obtained in one or other of the aforesaid sessions, less the excess, &c., “upon the security of certain lands, tenements and premises, as and for a sufficient security in that behalf: and the defendants then, in pursuance of their said retainer, caused to be prepared and executed a certain indenture, and certain securities, relating to the supposed estate and interest of the said G. R. in the said lands, tenements and premises, as and for such sufficient security for the repayment of the said sum of 600*l.* by the said G. R. to the plaintiff” in case such act should not be obtained in one or other of the aforesaid sessions, less the excess, &c. Averment, [•345 that such act was not \*obtained, &c., or made or passed, &c.,

within one or other or either or both of the aforesaid sessions: that plaintiff thereupon afterwards, &c., (stating the time of notice according to the terms before specified in the declaration,) to wit, on, &c., gave to G. R., and G. R. then received from plaintiff, notice to repay to plaintiff the said sum of 600*l.*, less the excess, &c. That plaintiff had not, at the time of the expiration of such last-mentioned notice, nor has he at any time thenceforth hitherto, received, on account of such salary as aforesaid, any sum of money exceeding 600*l.*, or any sum of money whatsoever. That he has not, at any time thenceforth hitherto, or at any time, received from G. R., or any other person, the said sum of 600*l.*, or interest, or any part thereof. Nevertheless "that the said supposed title, and estate and interest of the said G. R. in and to the said lands, tenements and premises, and the said lands, tenements and securities, by reason of the negligence and improper conduct of the defendants in the premises, were not, nor are, nor will be, any sufficient security for the said sum of 600*l.* and interest as aforesaid so due and payable to the plaintiff as aforesaid." To the damage, &c.

Pleas. 1. Non assumpsit. Issue thereon.

2. "That the plaintiff did not retain or employ the defendants, as the attorneys of and for the plaintiff, for fees and reward to them in that behalf, to use due and proper care in ascertaining the title of the said G. R. to the said lands, tenements and premises, and to take due and proper care that the same should be a sufficient security for the repayment of the said sum of 600*l.* by the said G. R. to the plaintiff, less the excess, \*346] if any, as in the declaration in that behalf \*mentioned, with interest as aforesaid, in manner and form as in the declaration alleged." Issue thereon.

There were also three pleas, two in denial of the breach, and the other alleging a discharge of the promise before breach, all leading to issues of fact; but upon which nothing turned.

On the trial, before Lord DENMAN, C. J., at the London sittings after Michaelmas Term, 1844, his lordship was of opinion that the contract, as laid in the declaration, included an undertaking on the part of defendants to ascertain the value of the premises; and, being further of opinion that no such undertaking could be created by the mere retainer, and that none was shown by the evidence, he nonsuited the plaintiff.

In Hilary Term, 1845, *Watson* obtained a rule nisi for setting the nonsuit aside.

Sir *F. Kelly*, Solicitor-General, and *Peacock*, now showed cause. It is clear that the general duty of an attorney(*a*) is very distinct from that of a surveyor: he undertakes to investigate only the legal requisites of a title, not its value. The evidence here did not show any undertaking beyond this. Then the only remaining question is, whether the declaration states

(*a*) On this point, *Peacock* referred to a ruling of Lord Abinger, at Nisi Prius, (Midland spring circuit, 1837,) reported, 1 Jurist, 137; *Green v. Dixon*.

the contract in such terms as to include an undertaking to examine into the value. The defendants are said to have promised, first, to “use due and proper care and diligence in and about ascertaining the title;” and, secondly, “to take due and proper care that the same \*should be a sufficient security for such repayment.” The second branch of the promise goes beyond the first, and clearly extends to an ascertainment of the sufficiency in point of value; otherwise it would be a mere repetition of the first branch, which provides for the ascertainment of the legal requisites. [\*347]

*Watson and Ball*, contra. The complaint is, not that the defendants have been negligent in ascertaining the value, but that they have not properly investigated the legal requisites of the security. The form of declaration is that given in 2 Chitt. Pl. 282, (7th ed.) “Sufficient security” means sufficient in point of law. It is a phrase commonly used to describe the duty resulting from a party being retained as attorney on an occasion of this kind; *Howell v. Young*, 5 B. & C. 259. Where, indeed, the attorney is employed to invest the money and find the proper security, a different question arises: that was the contract in *Dartnall v. Howard*, 4 B. & C. 345; where, however, the action failed, because no proper description was given of the character and employment of the defendant, nor was any thing else stated from which the alleged duty arose. If, again, the insufficiency of value appeared on the face of the deeds, that might raise a duty, on the part of the attorney, to give notice to the client. But nothing appears to be charged here which does not at once result from the retainer.

LORD DENMAN, C. J. I wish that I had allowed this case to go to the jury. I thought that the undertaking, as laid, did not stop at the legal investigation of the title, \*but meant more. But this, upon further consideration, I think is not so, especially as the undertaking laid is pointed by the words describing the retainer of defendants “as the attorneys.” [\*348]

PATTESON, J. I cannot say that I think the best possible words have been selected to describe the contract: but, on the whole, I think the undertaking charged was to ascertain that the title was good and that it was a sufficient security. These are not necessarily the same things. A title may be good, and yet, from its nature, insufficient as a security; for instance, if the party had a perfectly legal title, but only for a short term. The two phrases, therefore, do not mean the same thing, although the latter phrase does not comprehend an undertaking to inquire into the value. If the argument for the plaintiff necessarily imported that these two phrases did mean the same thing, I might, perhaps, have felt myself unable to accede to it, and have thought the nonsuit correct.

COLERIDGE and WIGHTMAN, Js., concurred.

Rule absolute.

\*349] \*The QUEEN against the Inhabitants of SCAMMONDEN.  
*Saturday, January 17th.*

For the purpose of settlement, a son is not emancipated before the age of twenty-one, unless he marries and so becomes the head of a family, or contracts some other relation so as wholly and permanently to exclude the parental control.

H. lived, till he was seventeen years old, with his father; he then voluntarily entered the local militia and was sworn in for four years. He served, as required by law, twenty-eight days in each year, and, during the residue of the time, worked as a weaver for wages, and maintained himself; saw his father occasionally, but never returned to live with him; and at the age of twenty he married.

*Held*, that H. was emancipated on his marriage and not before, for that neither the service in the militia, nor the employment at other times as a weaver created any relation permanently excluding parental control, and the emancipation by marriage did not relate back to the time when H. separated himself from his father.

And, therefore, that H. derived from his father a settlement acquired by him between that separation and the marriage.

On appeal against an order of justices, (October 7th, 1843,) removing Alice Hirst, single woman, and her bastard child, aged eleven months, from the township of Barkisland, in the West Riding of Yorkshire, to the parish, township, or place of Scammonden in the same Riding, the sessions confirmed the order, subject to the opinion of this court upon the following case.

James Hirst, the father of the pauper Alice Hirst, lived with his father, Arthur Hirst, in the appellant township, until he was about seventeen years of age, when he voluntarily entered the local militia, and was sworn in for the term of four years. At that time Arthur Hirst's settlement was in the appellant township. James Hirst served as a militia man for twenty-eight days in each of the four years, and lived the remaining eleven months of each year with an uncle in the respondent township, where he continued to follow his own business of a weaver, and maintained himself. He never returned to his father, his father having got married again and gone to live at Ripponden in Soyland in the West Riding; but he, James, saw his father occasionally. James got married when about twenty years of age. Between the times of his entering the  
 \*350] militia and getting married, and when he was about \*eighteen years of age, his father Arthur acquired a settlement in the township of Soyland, in the said Riding, by renting a tenement. Neither the pauper Alice Hirst nor her father James Hirst ever acquired a settlement in their own right.

Upon these facts the appellants contended that James Hirst, and consequently the pauper, acquired the settlement so obtained by his father, Arthur Hirst, in Soyland, as he was then under age and unemancipated. The respondents, on the other hand, contended that James Hirst did not acquire such settlement from his father, Arthur Hirst, as he was emancipated at the time when such settlement was gained. The sessions held

that James Hirst was emancipated when his father Arthur Hirst acquired such settlement in Soyland.

If this court should be of opinion that James Hirst was unemancipated at the time when such settlement was acquired by his father, Arthur Hirst, in Soyland, then the order of sessions and the order of justices were to be quashed: otherwise both to stand confirmed.

*Pashley and Overend*, in support of the order of sessions. In 1 Nol. P. L. 318, (4th ed.,) the author says that "it does not seem settled by an express decision, whether an emancipation, which is not completed but by the child's not returning under the age of twenty-one, is to refer to the period of its original separation within the age of minority, or to that of its arrival at the years of discretion." The present case substantially raises that point: and, on principle and analogy, the son never having returned into his father's family, the emancipation, whether by marriage or by attaining the age of twenty-one, will take effect, by relation, from the time \*when the father and son first separated, and when the father was still settled in the appellant township. It is not necessary for [\*351 this purpose that the separation should have taken place at a later period of the son's life than the age of seventeen. The rule by which a child before emancipation follows the settlement of the father or mother is not a technical one, but results from the necessity that a child should be with its parent for the purpose of support and protection: this is evident from *St. Katherine and St. George*, Fort. 218, *Paulsbury v. Woodon*, 2 Stra. 746; S. C. 2 Ld. Ray. 1473, and the authorities there collected in the margin and note, and the observations of counsel on the cases of that class, in *Pottinger v. Wightman*, 3 Mer. 67, 78, 9. The reason of the rule ceases when the necessity for support and protection ceases. An idiot, who is never able to take care of himself, is never emancipated; *Rex v. Much Cowarne*, 2 B. & Ad. 861. In *Rex v. Halifax*, Burr. S. C. 806, Aston, J., uses the term "independent of his father's family" as equivalent to "emancipated from it;" and instances, as a case of emancipation, that of a son who had been four years a soldier,<sup>(a)</sup> and "had ceased to be part of" his father's family. In *Rex v. Offchurch*, 3 T. R. 114, where the child had been separated from the father's family at the age of five, and it was held that no emancipation took place, Lord KENYON observed that "the father," though absent, "had a right to the custody of the son, and might have obtained him by habeas corpus; for the parental care was not then done away." And, in *Rex v. Roach*, 6 T. R. 247, 253, Lord KENYON said: "The rule to be extracted \*from the cases is this; [\*352 if the child be separated from the parents, and without marrying or obtaining any settlement for himself return to them again during the age of pupilage, he is to all intents a part of his father's family, and his settlement will vary with that of his father: but if, when that time arrives when in estimation of law the child wants no further protection from the

(a) *Rex v. Walpole St. Peters*, Burr. S. C. 638.

father, the child removes from the father's family, he is not for the purpose of a derivative settlement to be deemed part of that family." That is the rule which the respondents here contend for. GROSS, J., considers as a test the intention with which the child leaves the father's family; and this, in the present case, is sufficiently clear. *Rex v. Woburn*, 8 T. R. 479, where a son, serving in the militia, was held not to be thereby emancipated, is distinguished from this case by the particular facts, which were relied upon in the decision. [COLERIDGE, J. *Rex v. Wilmington*, 5 B. & Ald. 525, seems to raise the great difficulty of your case.] ABBOTT, C. J., there laid down, as a "general rule for the guidance of magistrates on this subject of emancipation," "that during the minority of a child there can be no emancipation, unless he marries, and so becomes himself the head of a family, or contracts some other relation, so as wholly and permanently to exclude the parental control." And he said, as to the case then before the court: "Here, the pauper was under twenty-one, and had neither married nor contracted any such relation as I have described, at the time when his father acquired the settlement at Bow. He was therefore not emancipated." But in the present case, after the separation and before "the father's change of settlement, relations ex-

\*353] cluding the parental control were contracted, by entering into the public service, and by engaging independently in business. [COLERIDGE, J., mentioned *Rex v. Hardwick*, 5 B. & Ald. 176.] There the pauper was drawn for the militia at the age of eighteen, served five years, and did not return to his father's house (except twice, for a few days at a time) till the expiration of that period. Afterwards, the settlement of the father changed; and it was held that the pauper's settlement did not change with it. The language of the court certainly grounds that decision on the fact that the pauper had attained twenty-one before the new settlement was acquired. But the point is first stated by ABBOTT, C. J., thus: "The rule of law is, that every new settlement acquired by the parent is communicated to the children so long as they remain members of his family; and the question in this case is, whether at the time when the father gained his settlement in Stanton Harcourt, this pauper remained a member of his family." He then says: "Now, during the minority of the child, he will remain almost under any circumstances unemancipated; but where the new settlement is acquired by the parent after the child has attained twenty-one, it will not be communicated unless in fact the child continues part of the family. Where, therefore, at that period he is absent, employed in gaining a livelihood for himself, or serving as in this case, in the militia, I think he no longer remains a member of the family." The words "under almost any circumstances" are very vague; and the

\*354] case differs from this in the facts. [COLERIDGE, J. The dictum is strong, as far as it goes.] In *Rex v. Rotherfield Greys*, 1 B. & C 345, the pauper enlisted in the marines at the age of nineteen, and went abroad, but, before he reached twenty-one, was discharged, and



returned to his father's family; after which, and after the pauper attained twenty-one, the father acquired a settlement: and the pauper was held to derive this settlement, not having been emancipated by his service in the army. But the court so held on the ground that he was not, by the service, made "wholly and permanently free from the parental control:" and BAYLEY, J., said: "if he had remained in the army till the age of twenty-one years, his emancipation would undoubtedly relate back to the time of his enlistment." That dictum, if correct, decides the present case. *Rex v. Cowhoneybourne*, 10 East, 88, and *Rex v. Lawford*, 8 B. & C. 271, do not affect the inferences drawn from the cases already cited. The assumption that twenty-one is the age of discretion for ordinary purposes has probably no other foundation than the rules of law under which guardianship was continued till that age. But those rules apply only to guardianship in chivalry, or under stat. 12 Car. 2, c. 24, s. 8; guardianship for nurture, or in socage, continued only till the age of fourteen, when the infant was considered as having sufficient discretion to choose his own guardian; 1 Bla. Com. 462. That a child, though under twenty-one, may cease to form part of the father's family, if absent without animus reverendi, appears from *Dean v. Peel*, 5 East, 45, referred to in *Harris v. Butler*, 2 M. & W. 539, 542, and *Grinnell v. Wells*, 7 Man. & G. 1033, 1042, \*and from *Blaymire v. Hayley*, 6 M. & W. 55. When an [\*355 infant is brought up on habeas corpus and discharged out of custody, the court leaves him to elect where he will go, if he be of an age to exercise a choice: *Rex v. Greenhill*, 4 A. & E. 624, 640; and that course has been taken in the cases of infants from eighteen years old down to eleven: *Rex v. Delaval*, 3 Burr. 1434; *Rex v. Smith*, 2 Stra. 982; *In re Lloyd*, 3 Man. & G. 547. The case of *Rex v. Lytchet Matraverse*, 7 B. & C. 226, may be cited against the relation, now contended for, of the emancipation to the original separation from the family; but the court there relied upon the assumption that pupilage continues till twenty-one in all cases, and not only under stat. 12 Car. 2, c. 24. And it was suggested in the judgment that the father might have dissolved the son's contract of service during his minority: but a minor is, in general, bound by a contract to serve and receive wages; *Rex v. Wigston*, 3 B. & C. 484, *Wood v. Fenwick*, 10 M. & W. 195, 204; and, if so, the father could not have set it aside.

*R. Hall*, (with whom was *Pickering*,) contra. A son who has ceased in fact to be a member of the father's family, and has attained twenty-one, does not participate in a settlement afterwards acquired by the father; that rule may be deduced from *Rex v. Cowhoneybourne*, 10 East, 88, and was acted upon in *Rex v. Hardwick*, 5 B. & Ald. 176. ABBOTT, C. J., in the latter case, uses the term "minority" as applying to an age under twenty-one, which is the ordinary legal sense of the term: the law as to guardianship in chivalry or by statute was not under \*considera- [\*356 tion, nor was it relevant. Again, if the son has married, or con-

tracted some other relation which wholly and permanently excludes the parental control; although he has not attained twenty-one, his settlement does not change with that of the father; *Rex v. Wilmington*, 5 B. & Ald. 525. Marriage, therefore, as well as the arriving at twenty-one, may be a dividing point: and that is the case here. The enlistment in the local militia<sup>(a)</sup> did not permanently exclude the parental control; for the service could last only twenty-eight days, unless in case of rebellion or invasion. (*Hall* was then stopped by the court.)

LORD DENMAN, C. J. I think the language of Lord TENTERDEN, in *Rex v. Wilmington*, has become the rule on this subject: and that the term "minority," in a case of this kind, must be taken in the sense in which it is now generally understood, and independently of any law as to the times at which persons became of age for different legal purposes. Here, the son was separated from his family according to the rule in *Rex v. Wilmington* when he married, and not before; and till that time his settlement followed that of his father.

PATTESON, J. I am of the same opinion. The judgment in *Rex v. Wilmington* decides this case.

COLERIDGE, J. There is no doubt as to the meaning of minority in a case of this kind. And I think that, as Mr. *Hall* contends, the marriage here was the dividing point. The absence, alone, did not create a  
 \*357] "permanent separation from the father's family; nor could the service in the militia have that effect, being only for a limited time, unless in particular cases, which did not arise: and no other control, inconsistent with that of the father, appears by the case. I think, therefore, that the son was not emancipated when the settlement of his father changed.

WIGHTMAN, J. I had some doubt whether the enlistment did not create such a relation as wholly and permanently excluded the parental control, within the meaning of *Rex v. Wilmington*. But I think the service in the local militia, as it has been explained, did not establish such a relation: the parental control could not be wholly and permanently excluded by it unless under particular circumstances, which did not happen. Nothing, then, appears by which emancipation could take place till marriage or the age of twenty-one. The son, therefore, up to the time of his marriage was a member of his father's family. Order of sessions quashed.

(a) No particular militia act was mentioned; and the case did not assign any dates to the facts.

**\*MARY SHORT against STONE. Tuesday, January 20th.**

[\*358]

In a declaration for breach of promise to marry plaintiff within a reasonable time after request by her, if the count shows that the defendant, after promise and before action brought, married a person other than the plaintiff, request is not a necessary averment: and a plea to such count, alleging, as new matter, that request was not made, is no defence.

The declaration, averring defendant's marriage to such other person, need not show that the person is still living.

So held, on demurrer to a plea which stated, by way of confession and avoidance, that plaintiff did not, at any time before action brought, request defendant to marry.

**ASSUMPSIT.** The declaration stated that heretofore, to wit, on, &c., "in consideration that the plaintiff, being then unmarried, at the request of the defendant, had then promised the defendant to marry him the defendant, he the defendant then promised the plaintiff to marry her within a reasonable time next after he should be thereunto requested by the plaintiff so to do; and the plaintiff avers that she, confiding in the said promise of the defendant, hath always hitherto remained and continued, and still is, sole and unmarried, and was always, from the time of the making of her said promise until the marriage of the said defendant as hereinafter mentioned, ready and willing to marry the defendant, whereof the defendant hath always had notice: yet the defendant, disregarding his said promise, after the making thereof and before the commencement of this suit, to wit, on," &c., "wrongfully and injuriously married a certain other person, to wit, one Edith Collins, contrary to his said promise: to the damage," &c.

**Plea 2.(a)** "Defendant says that he was not at any time before the commencement of this suit requested by the plaintiff to marry her according to his said promise in that behalf." Verification.

\*Demurrer, assigning for causes, among others, that the plea [\*359] confesses, but does not sufficiently avoid, and defendant has therein alleged a fact wholly immaterial to the merits: "for, inasmuch as it appears by the declaration that the defendant, before the commencement of the suit, had married another person, the plaintiff need not nor ought not to have requested the defendant to marry her." Also, that the plea "tenders too large and an insufficient issue, to wit, whether a request were made before the commencement of this suit; whereas, if the request be material at all, it should have been alleged not to have been made before the marriage of the defendant: for, if the plaintiff were to traverse the allegation as it now stands in the said plea, and the same should be found for her, still it would not show conclusively that she was and is entitled to maintain her action, as it would be consistent with the said issue, and verdict thereon, that the request found to have been made by the plaintiff was after the

(a) The other pleas were: 1. Non assumpsit. Issue thereon. 3. That, before breach, and before action brought, to wit, on, &c., plaintiff and defendant mutually agreed that the contract should be rescinded, and they be respectively discharged, &c., and they did then respectively discharge each other, &c., and the contract was accordingly rescinded: verification. Replication, denying the agreement and rescinding. Issue thereon.

said marriage, and between it and the commencement of this suit." Also that the plea should have concluded to the country.

Joinder in demurrer.

*Peacock*, for the plaintiff. The want of a request is immaterial, since it appears that the defendant had put it out of his own power to comply with the request, if made. This case was before the court in last Hilary term, the plaintiff having signed judgment on the ground that the plea, denying a request, was not issuable, and the defendant was under terms to plead issuably. WIGHTMAN, J., set that judgment aside; and a motion was made here to rescind his order. The declaration did then aver a  
 \*360] request; and the court intimated an opinion that \*the averment  
 of non-performance on request was one distinct breach, and the averment that defendant had married another person was a second, and that a material traverse might be taken upon either. (a) The learned  
 \*361] \*judge's order was upheld; and the plaintiff then amended the declaration, leaving it in its present form. That form is good, according to *Harrison v. Cage and Wife*, 1 Ld. Ray. 386, 3 Ld. Ray. 268, where the plaintiff declared for breach of promise of marriage, stating that the defendant, Elizabeth Cage, after the promise, &c., married the male defendant; and it was objected that there is no time prefixed, and "he does not show a request with a parson." But these exceptions

(a) The declaration, as originally framed, after the allegation of notice to defendant of plaintiff's readiness, went on as follows: "And, although the plaintiff afterwards, and after the making of the said promise of the defendant, and before the commencement of this suit, to wit, on," &c., "offered to marry him the defendant, and although a reasonable time, from the making of such request, for the defendant to marry the plaintiff, had elapsed before the commencement of this suit: yet the defendant, not regarding his said promise, did not nor would, when he was so requested, or within such reasonable time as aforesaid, or at any other time, marry the plaintiff, but hath hitherto wholly neglected and refused so to do: And the plaintiff further saith that the defendant, further disregarding his said promise, after the making thereof, and after such request as aforesaid," &c.; alleging the marriage to E. Collins. In other respects, the declarations were substantially the same. Pleas: 1. Non assumpsit. 2. "That the plaintiff did not request the defendant to marry her, nor tender or offer to marry him the defendant, in manner and form," &c. 3. A mutual waiver.

*Peacock*, in Hilary term, 1845, obtained a rule for rescinding the order of WIGHTMAN, J., whereby the judgment signed for pleading a plea not issuable was set aside. In the same term, (January 31st)

*Butt* showed cause, and *Peacock* was heard in support of the rule. Some of the authorities mentioned in the argument in the text were cited.

Lord DENMAN, C. J. It seems to me that the plaintiff has brought a disadvantage upon herself. If she had confined the breach to the marriage of the defendant, the cases cited would have been applicable. But she has chosen to put on the record an allegation which throws the breach upon the not marrying after request, followed by another fact which might indeed cogently show that no request need have been made before breach, or that there was no performance of the contract. Suppose a party, who had purchased goods to be delivered on request, were to add, after an allegation of non-delivery on request, that the vendor, instead of delivering the goods, threw them into the sea: would it not be a good answer that no request had been made? So, here, by adding the allegation of the marriage, you merely add that which may be evidence as to the breach first assigned. The plea is, therefore, issuable.

PATTERSON, J. I think the plea is issuable; what its value is, we shall see, if Mr. *Peacock* chooses to demur. The allegation shows a contract, a complete breach, and then another breach: that does not entitle the plaintiff to say that the first breach is immaterial.

COLERIDGE and WIGHTMAN, Js, concurred.

Rule discharged.

were not regarded; "for, as to the time, it should be in convenient time; and as to the request with a parson, that was overruled in *Dickinson and Holcroft's Case*." (a) "Besides, that in this case it appears that the defendant has disabled herself by marriage from the performance of her promise." *Ford v. Tiley*, 6 B. & C. 325, affirms the principles on which the plaintiff relies. That was an action of assumpsit for breach of defendant's promise to grant a lease of certain premises "with all possible speed after he should become possessed of" them: the declaration averred that "defendant might have been possessed, but that he fraudulently prevented himself from becoming possessed, and deceitfully refused to take possession:" and it appeared in evidence that, at the time of the agreement, January, 1824, the premises were under a lease which had \*three years and a half to run, and that, during that time, namely, in [362 June, 1825, the defendant executed a lease to other parties than the plaintiff, commencing from September, 1825. BAYLEY, J., delivering the judgment of the court, said: "It was objected at the trial, and the question was saved, whether the action was not premature, on the ground that the lease, which was in esse at the time of the agreement, would not have expired till Midsummer, 1827, and was still, as to these parties, to be deemed a subsisting lease; but though we are satisfied that that lease is, as between these parties, to be considered as subsisting, and that the defendant cannot hitherto have been taken to have been possessed, and has never had a right to have the possession, we are of opinion that the action is maintainable; because, by the lease of June, 1825, the defendant has given up his right to have the possession, and has put it out of his power, so long as the lease of June, 1825, subsists, to grant the lease he stipulated to grant." In *Bowdell v. Parsons*, 10 East, 359, 361, the plaintiff declared in assumpsit for not delivering hay which the defendant had sold him and promised to deliver on request: the request was imperfectly alleged; but the declaration stated that the defendant did not deliver the hay to the plaintiff, and, "on the contrary, afterwards sold and disposed of" it "to other persons, without the consent and against the will of the plaintiff:" and Lord ELLENBOROUGH said: "There is clearly a sufficient breach laid in that count; for by the defendant's selling and disposing of the rest of the hay to other persons, he disqualified himself from delivering it to the plaintiff; and therefore no request was necessary." [\*COLE- [363 RIDGE, J. The plea here denies, in effect, any request either before or after the marriage.] If there was a request before the marriage, and the defendant was ready to comply, but the plaintiff prevented it, that was matter to be stated in answer to the declaration. After the marriage, a request could not be made. It may, indeed, be said that the defendant's wife might die, and a request be made then: but that supposition is too remote; otherwise, it would have been an answer in *Ford v. Tiley*, 6 B. & C. 325, that the new lease might have been surrendered, or

(a) *Holcroft v. Dickinson*, Carter, 233; S. C. 1 Freem. 95; 3 Keb. 148.

in *Bowdell v. Parsons*, 10 East, 359, that the defendant might have repurchased the hay before request made. And in *Ford v. Tiley*, 6 B. & C. 327, the court said, referring to 8 (5) Vin. Ab. 225, (224,) tit. *Condition* (B. c.) pl. 1, 2: "If a day be limited to perform a condition, if the obligor once disables himself to perform it, though he be enabled again before the day, yet the condition is broken, as if the condition be to enfeoff another before Michaelmas; if, before the feast, he enfeoffed another, though he after repurchases, yet he cannot perform the condition." And it may be asked here, if the suggested argument is admissible, how long the plaintiff's remedy is to be suspended on a supposition that the wife may die, and a request be then made?

*Butt*, *contra*. *Harrison v. Cage*, 1 Ld. Ray. 386, was decided, not on demurrer, but on motion in arrest of judgment: the contract to marry was averred generally, 3 Ld. Ray. 269: here it is to marry within a  
 \*364] reasonable time after request; so that the request is a condition precedent. And the point there decided was that a request "with a parson" need not be averred: no dispute could arise on the necessity of a request generally, for the declaration did fully aver one. Again, the declaration there showed that the person whom the defendant married was still living. Here the declaration does not aver either that fact, or a request made and lapse of a reasonable time afterwards, or that any reasonable time has elapsed since the promise. In *Ford v. Tiley*, 6 B. & C. 325, the question arose, not, as here, on demurrer, but on the evidence at the trial, and appears, by the citation of authorities,<sup>(a)</sup> to have been decided without reference to the distinction between a feoffment on condition and a mutual contract. The Year-book, Mich. 21 Ed. 4, 54 B. 55 A. pl. 26, cited in 5 Vin. Ab. 224, tit. *Condition*, (B. c.), pl. 1, 2, speaks of a condition to enfeoff. If a feoffment be made on condition that the feoffee shall enfeoff another, and he enfeoffs a stranger, then, because he has disabled himself to perform the condition, the feoffor may re-enter; Litt. s. 355, Co. Litt. 221 a: and Lord COKE makes a distinction between disability incurred in such a case by the feoffor and by the feoffee, observing (222 a): "if a man make a feoffment in fee upon condition, that, if the feoffor or his heirs pay a certain sum of money before such a day, the feoffor commit treason, is attainted and executed, now is there a disability on the part of the feoffor, for he hath no heir; but if the heir be restored before the day he may perform the condition."  
 \*365] "Otherwise it is if such a disability had grown on the part of the feoffee; and the reason of the diversity is, for that, as Littleton saith, *maintenant* by the disability of the feoffee, the condition is broken, and the feoffor may enter, but so it is not by the disability of the feoffor, or his heirs; for if they perform the condition within the time, it is sufficient, for that they may at any time perform the condition before the day. And so it is if the feoffor enter into religion, and before the day is

(a) See p. 327.



deraigned, he may perform the condition for the cause aforesaid." But the law thus expounded does not apply to the case of ordinary contracts: nor does it result from the authorities that, if one contracts to deliver goods in twelve months, and parts with them within that time, there is a breach before the twelve months expire; or that, if a person agrees to enfeoff by a certain day, and before that day makes a different disposition, a breach of contract is then made. In cases of mere contract, if the thing is to be done on request, a request is material and must be specially averred; Com. Dig. *Pleader*, (C. 69,) 1 Chitty on Pl. 339, 340, (7th ed.) No question on this point was raised in *Ford v. Tiley*, 6 B. & C. 325. In the case of a promissory note payable at a specified time after demand, the Statute of Limitations begins to run from the demand; *Thorpe v. Booth*, Ry. & M. 388. In *Bowdell v. Parsons*, 10 East, 359, a part of the chattel sold had already been delivered to the plaintiff: the residue might well be considered his property without any request. If, in the present case, the defendant, by marrying another, broke his contract with the plaintiff, though not requested to marry her, it \*must be [\*366 assumed that he had impliedly contracted to remain single until requested, however long the time might be. Further, it is a good objection that the person whom the defendant married is not shown to be still living; and such a point may be raised on general demurrer; *Fryer v. Coombs*, 11 A. & E. 403; *Dayrell v. Hoare*, 12 A. & E. 356. [COLERIDGE, J., mentioned *Seymour v. Gartside*, 2 Dowl. & R. 55, but observed that the question in that case arose after verdict. PATTESON, J. The marginal note there states that the plaintiff alleged a promise to marry "within a reasonable time after the request;" but the declaration, as stated in the report, says "in a reasonable time then next following."] Where the contract is to marry within a reasonable time after a certain event, the court cannot conclude by inference that the event has happened.

*Bull* also mentioned *Caines v. Smith*, 15 M. & W. 189,(a) then depending in the Court of Exchequer.

*Peacock*, in reply. It is true that, in *Harrison v. Cage*, 1 Ld. Ray. 386, request was not made a condition precedent; but the point on which the decision turned was the disability incurred by the defendant. Where there is a condition precedent, performance, or a dispensing with it, must undoubtedly be averred: but here a dispensation is averred. [WIGHTMAN, J. Suppose it appeared that the wife had died before the commencement of this action, and before request.] Still there was a breach. \*The [\*367 defendant's situation was essentially changed. It might reasonably be asked in that case how long the plaintiff was bound to wait after the death of the wife. Or, on the other hand, if the defendant had, at any time afterwards, requested the plaintiff, whether she would have been liable to an action for refusing him. Suppose, in a case like this, the

(a) Where the court afterwards decided in accordance with the judgment in the present case.

woman had married, and had children, and her husband had died, could she then have required the man to marry her, and brought an action for refusal? As to the supposed inconvenience that the defendant might have been bound to remain single for an indefinite time if not requested, he might have requested the plaintiff to marry him, and brought an action if she had refused. The obligation was mutual. [*Butt* here pointed out that the declaration averred a promise by defendant to marry plaintiff within a reasonable time after request, in consideration that plaintiff had promised to marry him; not adding any words as to a request.] In 1 Sugd. Vend. 260, 261,(a) the author, after observing that "in agreements for purchase, the covenants are construed according to the intent of the parties, and they are therefore always considered dependent where a contrary intention does not appear," says: "If, therefore, either a vendor or vendee wish to compel the other to observe a contract, he immediately makes his part of the agreement precedent; for he cannot proceed against the other without an actual performance of the agreement on his part, or a tender and refusal." That, in principle, applies to the present case. The defendant, here, might have made his own request the condition \*precedent. The supposed hardship, therefore, \*368] need not arise. But here the defendant treats as the condition precedent a request by the plaintiff, which he has put it out of her power to make. As to the distinction between a contract and a feoffment on condition; the authorities were much considered in *Ford v. Tiley*, 6 B. & C. 325, and this point was not adverted to: nor does it appear to have been noticed at the bar or in the Bench in *Bowdell v. Parsons*, 10 East, 359. *Amory v. Brodrick*, 5 B. & Ald. 712, S. C. 1 Dowl. & R. 361,(b) is an additional authority for the general doctrine relied upon by the plaintiff. There defendant, assignor of a bond, covenanted with plaintiff, the assignee, that defendant would, at plaintiff's request, avow, ratify, &c., all actions to be brought by him upon it, without releasing the same. In a declaration on this covenant, the breach laid was that plaintiff sued the obligee in defendant's name on the bond, but defendant did not, although requested, avow, &c., the action, and, on the contrary, released the same. On demurrer, alleging for cause that the request was imperfectly stated, this court overruled the objection. BAYLEY, J., said: "The substantial part of the breach is, that the defendant had disabled himself from keeping his covenant, and that is a good breach to maintain the action." HOLROYD, J., added: "The party covenants to do a particular thing, and the breach assigned is, that he has done an act whereby he has rendered himself incapable of doing that thing. That is a good breach." In Com. Dig. *Condition*, (M. 3,) under the general head "What shall be a breach," it is said: "So, if he be disabled to perform \*369] in the same \*plight and condition that it was when the condition was created."

(a) 11th ed. chap. 4, s. 4, §§ 56, 58.

(b) Peacock read from the latter report.

LORD DENMAN, C. J. We must look at this case with a view to the feelings and intentions of the parties at the time of entering into such a contract: and the intention clearly is, to marry in the state in which the parties respectively are at the time. If either party puts himself out of that state, he must be taken to dispense with the contract so far that the other may have an action against him without a request to marry. It is unnecessary to inquire what cases, among those which have been mentioned, are analogous to this, because here the intent must be considered: and, looking to that, the fact stated on the record is a necessary dispensation. According to this, which appears to me the true construction of the contract, the plaintiff shows a good right of action, and is entitled to judgment.

PATTESON, J. The only difficulty I had was on the averment of a promise to marry within a reasonable time after request. If the allegation had been of a promise, generally, to marry, or a promise to marry on request, or in a reasonable time, the application of the case in Lord Raymond would have been clearer. But, on consideration, I do not see any rational distinction between the averments of a promise to marry on request and a promise to marry in reasonable time after request. We must look to the intention; and, if a party puts himself out of the condition in which a request could properly be made, he dispenses with the request. Here it is alleged that the defendant married another person. It was not necessary to show that that person was living \*when the action was commenced: here was a breach of contract at once when the defendant married. [\*370]

COLERIDGE, J. The declaration is good, and the plea bad, for the same reasons. The promise to marry within a reasonable time after request must mean after request within a time when it might reasonably be made. If the defendant disables himself from fulfilling such a request, then, in the first place, he dispenses with the request, because it has become impossible to make the request effectually; and, secondly, he has broken his own contract, because he is no longer able to fulfil that. It is no matter how long the person whom the defendant has married lives, the contract having been once broken; and the averment of a request to fulfil it is immaterial.

WIGHTMAN, J. I am of the same opinion. The facts stated in the count show a dispensation with the request to marry.

Judgment for plaintiff.(a)

(a) See the next case.

\*371] \*The following case was decided on a subsequent day of this term.

LOVELOCK against FRANKLYN and COX, Executors of THOMAS DELL. *Friday, January 23.*

Plaintiff declared upon a contract by defendant, then holding land for a term of years, to assign all his interest to plaintiff on payment, by plaintiff, within seven years from a day named, of 140*l.* Breach that, before the seven years had expired, defendant assigned all his interest to a stranger. On special demurrer, *Held*:

1. That it was not necessary that the declaration should aver tender of money, or request, by plaintiff, or plaintiff's readiness to accept an assignment.
2. That the breach, as laid, was a good ground of action, the defendant having incapacitated himself from performing the contract, if called on.

By writing not under seal, reciting that D. had purchased, for the residue of a term, four messuages, in one of which the plaintiff resided, it was agreed that plaintiff should continue to reside in that messuage during the residue of D.'s interest, if plaintiff should so long live, at the yearly rent of 1*s.*, and D. further agreed to assign all his interest in the said premises, purchased by D. as aforesaid, to plaintiff, on payment of 140*l.* within a stated period.

*Held*, 1. That this was a lease.

2. That it was also an agreement, and required an agreement as well as a lease stamp, inasmuch as the lease and the agreement comprehended distinct subject matters.

ASSUMPSIT. The declaration stated that, whereas before and at the time of the making of the agreement and promise of Thomas Dell after-mentioned, and in his lifetime, to wit, on 7th January, 1840, the said Thomas Dell had purchased of one John Frankland his estate and interest in a certain piece or parcel of ground situate, &c., together with four messuages or tenements, thereon erected and built, for the residue and remainder of a certain term of years, and in one of which messuages, being a dwelling-house, the plaintiff had for some years resided; and the said Thomas Dell became and was possessed of the said premises for the residue of the said term of years: and thereupon, heretofore, and in the lifetime of the said T. D., to wit, on, &c., by an agreement then made between T. D. of the one part and plaintiff of the other part, it was agreed

\*372] between them that the plaintiff should continue to reside in the \*said house during the residue of the said T. D.'s term and interest therein, provided plaintiff should so long live, paying the annual rent of 1*s.*; plaintiff doing all necessary repairs to the said house at his own expense, and also paying the taxes, &c.; and, in the event of plaintiff dying during the continuance of the said term, leaving his then present wife him surviving, T. D. did thereby agree to allow plaintiff's said wife to reside therein on the same terms: and it was also agreed that, with respect to a yard at the back, the said T. D. was to make what use he might think proper of it, the plaintiff being allowed to use it also in the way of business: and T. D. thereby further agreed with plaintiff to assign all his interest in the said premises, purchased by the said T. D. as aforesaid, to plaintiff on payment by plaintiff to T. D., within seven years from 13th July, 1838, of 140*l.*, together with all expenses T. D. might be

put to in the transfer thereof: and, the said agreement being so made as aforesaid, afterwards, and in the lifetime of the said T. D., to wit, on, &c., in consideration thereof, and that plaintiff at request of T. D. then promised, &c., (mutual promises, by plaintiff and T. D., to perform the agreement on their respective parts:) and plaintiff, confiding in the said agreement and promise of T. D., continued to reside in the said house, under the terms of the agreement, for a long time, to wit, from the making of the agreement hitherto, and hath performed all things therein contained on his part, &c., to be performed: yet T. D., not regarding his said agreement and promise, after the making of the same, and during the said term of seven years from 13th July, 1838, and during the continuance of T. D.'s said interest in the said premises, purchased by him as \*aforesaid, and before any assignment of the said T. D.'s interest in the said premises to plaintiff, and before the period by the said agreement provided for the said T. D. to assign to the plaintiff on payment as aforesaid had elapsed, and before the commencement of this suit, to wit, 1st June, 1840, wrongfully, and without the consent of the plaintiff, bargained, sold, assigned and transferred unto one Philip Williamson all the estate and interest of him the said T. D. of and in and to the said premises, with the appurtenances, and so purchased of the said John Frankland as aforesaid, to have and to hold the same unto the said P. W., his executors, administrators, and assigns. By means and in consequence of which said assignment and transfer, T. D., and defendants, as executors as aforesaid, were, and defendants still are, disabled and hindered and prevented from performing and fulfilling, and it thereby then became and was impossible for T. D. in his lifetime, and for defendants, as executors as aforesaid, or otherwise, after his death, to perform or fulfil, and they have not, nor hath either of them, performed or fulfilled, the said agreement, and his said promise to assign to plaintiff the said T. D.'s interest in the said premises so purchased, &c.: and plaintiff has been hindered and prevented from having made to him an assignment of that interest on payment as aforesaid, which he otherwise would have had made: and is otherwise damnified, &c. [\*373]

Special demurrer, assigning for causes the objections afterwards urged in argument.

Joinder in demurrer.

*Bovill*, for the defendants. First, the declaration ought to have shown a tender of assignment for Dell's \*execution, accompanied by a tender of the money, or at any rate should have averred a request by the plaintiff, or the plaintiff's readiness to pay the money and accept the assignment. It does not appear that he had either the intention or the means of purchasing the assignment. [COLERIDGE, J. At what time should the tender have been made?] When the assignment was required. [PATTESON, J. He had a period of seven years, at any point of which he might have required the assignment] At least he should have averred [\*374]

that he would have been ready at some time in the seven years. [PATTESON, J. Must a man say, I now undertake to be ready six years hence? He might die in the interval.] He ought to show his ability. [PATTESON, J. Ability at what time?] At the time of the breach. [PATTESON, J. Ability at that time is not essential to the maintenance of the action.] It has been held in this court that a party complaining of a refusal by the East India Company to transfer stock should show that he had given the company the name of the person to whom the transfer was to be made.<sup>(a)</sup> [Lord DENMAN, C. J. Because, till that was done, the company could not know what act they were called on to perform.] In *Bowdell v. Parsons*, 10 East, 359, 361, where the necessity of a request was held to be superseded by the defendant having disqualified himself from performing the contract, the declaration averred that the plaintiff was ready and willing to accept the goods and pay for them. The same averment may have been made in *Ford v. Tiley*, 6 B. & C. 325: \*375] the report does not give the declaration. \*The averment of readiness to perform is, on general demurrer, an averment of ability to do so; *De Medina v. Norman*, 9 M. & W. 820. If the doctrine in *Short v. Stone*, ante, p. 358, be interpreted so as to control the present case, it would seem to follow that it would be enough to state that defendant promised to marry the plaintiff, but had since married some one else; but surely the plaintiff's readiness, or ability, to marry the plaintiff must be both averred and proved, as part of the plaintiff's case.

Secondly, the declaration shows no breach of the contract described. It appears only that Dell, during the seven years, parted with all his interest to a stranger. That is not even evidence of a breach. It would be a full performance of the contract if the defendant were to assign when demand and tender of payment were made by the plaintiff; and he may well recapacitate himself to do this before the occasion arrives. [COLERIDGE, J. The period of seven years is provided for the election, not of the defendant, but of the plaintiff. The defendant is to be ready throughout.] It is enough if he is ready when called on. In *Hibblewhite v. McMorine*, 5 M. & W. 462, the plaintiff contracted to sell the defendant railway shares, to be delivered and paid for on a future day named, "or at any intermediate date that the defendant might require them, by paying the plaintiff for the said shares at par per share;" and mutual promises were averred: and it was held that, to a declaration complaining that, although plaintiff was ready to transfer, defendant would not accept and pay, it was no answer that, at the time of the contract, the plaintiff was not possessed of the shares, and had not contracted for any, \*376] \*and had no reasonable expectation of being possessed of them within the time, otherwise than by purchasing them after the agreement made. This argument is not met by *Ford v. Tiley*, 6 B. & C. 325; for there the defendant contracted to execute a lease "with all

(a) *Gregory v. East India Company*, 7 Q. B. 199.



possible speed after he should become possessed :” and he had no right to postpone his own power of performance at all. [Lord DENMAN, C. J. I do not see why your argument would not have been applicable in *Bowdell v. Parsons*, 10 East, 359, as well as here.] It is only in the case of a technical breach of condition giving a right of immediate entry that a temporary disability has the effect of an absolute breach. In Littleton, sects. 355, 356, 357, the case is put of a feoffment made on condition that the feoffee shall enfeoff another, after which the feoffee parts with the land, or an interest in it, to a stranger; and it is said that in these cases the feoffor may re-enter, because the feoffee has disabled himself from performing the condition: and (in sect. 357) the author adds: “many have said, that if such feoffment be made to a single man upon the same condition, and before he hath performed the same condition he taketh wife, (a) then the feoffor and his heirs *maintenant* may enter, because, if he hath made an estate according to the condition, and after dieth, then the wife shall be endowed.” Upon which Lord COKE, (Co. Lit. 221 b,) remarks: “Here it appeareth, that seeing that for this title or possibility the feoffor may presently enter, that albeit the wife happen to die before the husband, so as this title or possibility took no effect, \*yet the feoffor may re-enter, for the feoffee being disabled at any time though the same continue not, yet the feoffor may re-enter, for in that case he that is once disabled is ever disabled. And herein a diversity is to be observed between a disability for a time on the part of the feoffee, and a disability for a time on the part of the feoffor. For if a man maketh a feoffment in fee, upon condition that the feoffee before such a day shall re-infeoff the feoffor, the feoffee taketh wife, and the wife dieth before the day, yet may the feoffor re-enter. So it is if the feoffee before the day entereth into religion, and is professed, and before the day is deraigned, yet the feoffor may re-enter. So it is if the feoffee before the day make a feoffment in fee, and before the day take back an estate to him and his heirs, yet the feoffor may re-enter. Albeit in these cases a certain day is limited, yet the feoffee being once disabled is ever disabled. And so it is when no time is limited by the parties, but the time is appointed by the law. But if a man make a feoffment in fee upon condition, that if the feoffor or his heirs pay a certain sum of money before such a day, the feoffor commit treason, is attainted and executed, now is there a disability on the part of the feoffor, for he hath no heir; but if the heir be restored before the day he may perform the condition.” “Otherwise it is if such a disability had grown on the part of the feoffee; and the reason of the diversity is, for that, as Littleton saith, *maintenant* by the disability of the feoffee, the condition is broken, and the feoffor may enter.” The possibility of performance on the day named is therefore enough, unless there be a technical breach of condition and right of immediate entry. [\*377]

(a) See, as to the immediate revocation of a feme sole's submission to an award, by her marriage, *Charnley v. Winstanley*, 5 East, 266.

*Willes*, *contra*, was stopped by the court.

\*378] \*Lord DENMAN, C. J. The plaintiff has a right to say to the defendant: "You have placed yourself in a situation in which you cannot perform what you have promised: you promised to be ready during the period of seven years; and, during that period, I may at any time tender you the money and call for an assignment, and expect that you should keep yourself ready; but, if I now were to tender you the money, you would not be ready." That is a breach of the contract. No case contradicts this view: the language in the authorities relied upon by the defendants relates to a different state of things. Where a party agrees to sell, or to lease, on a given future day, he may have all the intermediate time open to him for acquiring the means of performing his contract: but here the party puts it out of his power to perform what he has agreed to perform; that is, to assign at any time at which he may be called upon. This distinction shows that the passage cited from Lord COKE is inapplicable: that proves no more, on the point now before us, than that, if an act is to be performed at a future time specified, the contract is not broken by something which may merely prevent the performance in the mean time. We are introducing no novelty. In all the cases put for the defendants, the party had the means of rehabilitating himself before the time of performance arrived: here he has incapacitated himself at the very time when he may be called on and should be ready.

PATTESON, J. In this particular contract, the defendant has undertaken to keep himself ready for the whole time: but he has parted with all his interest, and has made it impossible for himself to perform, if now called on.

\*379] \*COLERIDGE, J., concurred. Judgment for plaintiff.(a)

(a) Wightman, J., was absent.

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*Tuesday February 9th, 1847.*

The defendant also pleaded Non assumpsit; on which issue was joined.

There were other pleas, which are not material here.

On the trial before COLERIDGE, J., at the Middlesex sittings in Hilary term, 1846, the plaintiff offered in evidence an agreement in the terms stated in the declaration. The agreement had a 1*l.* stamp. It was objected that the instrument was a lease as well as an agreement, and should therefore have had another 1*l.* stamp on it as a lease. The learned Judge allowed the cause to proceed; and the plaintiff had a verdict.

*Petersdorff*, in the same term, obtained a rule nisi for a new trial on the ground that the instrument was not properly stamped.

*Knowles* and *Willes* now showed cause. The 1*l.* stamp was sufficient, if the instrument was a lease only or an agreement only; if it was both a lease and an agreement, then a further stamp was necessary.

The instrument was an agreement only, and not a lease. The terms throughout are terms of agreement and not of demise. The instrument contains no determinate period of demise; if a lease at all, it must be a lease for life, which can be made only by deed.

If this was a lease, the agreement was a mere \*accessory, and a lease stamp alone was sufficient. The introduction of several matters does not render several stamps necessary when the several matters constitute one transaction, and the stamp imposed is appropriate to the principal matter contained in the instrument: *Price v. Thomas*, 2 B. & Ad. 218; *Rex v. Louth*, 8 B. & C. 247; *Doe dem. Hartwright v. Fereday*, 12 A. & E. 23. On the same principle the introduction of collateral matters into an agreement relating to the sale of goods does not render a stamp necessary, the principal matter not requiring one. *Corder v. Drakeford*, 3 Taunt. 382, where it was held that a lease containing a contract to purchase fixtures could not be given in evidence to prove the purchase without a lease stamp, though it had an agreement stamp, is not an authority against the plaintiff; for there the lease was the principal matter, and had no stamp at all. [\*380]

*Petersdorff*, contra. The instrument was a lease according to the well-known definition in 4 Bacon's Abr. 816, *Lease* (K), 7th ed. [WIGHTMAN, J. What is the "determinate time," for which the lessor divests himself of possession?] The residue of Dell's term if the plaintiff should so long live.

The agreement is not accessory to the lease, but distinct from it. In the former part of the instrument the parties contract the relation of landlord and tenant; in the latter part they become vendor and vendee. The latter part also introduces a distinct subject matter; for the lease applies to one messuage only, and the agreement to the whole of the property. An instrument \*containing distinct matters requires distinct stamps; *Rex v. Reeks*, 2 Str. 716; *Doe dem. Copley v. Day*, 13 East, 241. (He was then stopped by the court.) [\*381]

LORD DENMAN, C. J. I think the instrument was a lease. It was also an agreement; and the agreement related to other premises besides the messuage which was the subject of the lease. *Wharton v. Walton*, 7 Q. B. 474, was something like this case. There plaintiff let a public house to W., and W. agreed under penalties to take all his beer from the plaintiff. At the end of the agreement the third person (the defendant) was introduced, who gave his guarantee for any amount of money, up to 36*l.*, that might become due from W. We held that a lease stamp alone was insufficient, and that there should also have been an agreement stamp in respect of the guarantee. I think the stamp in this case was insufficient.

PATTESON, J. I am of the same opinion. I think this instrument was a lease; and it was no more a freehold lease than if it had been for ninety-nine years if the plaintiff should so long live. Then, the agreement was

not merely accessory to the demise ; for the agreement introduces a different subject matter ; the lease is of one house, and the agreement for sale relates to several houses.

WIGHTMAN, J. (a) I did entertain some doubt whether this instrument was a lease, because I could not discover a demise for any definite term.

\*382] But the maxim \**“id certum est quod certum reddi potest,”* applies ; and the term may be ascertained by ascertaining what was the residue of Dell’s term in the premises. I doubted also whether the agreement for purchase was not secondary to the lease. But, as my Lord and my Brother PATTESON have observed, the agreement extends to premises which are not the subject of the demise at all ; and consequently it required a distinct stamp. Rule absolute. (b)

(a) Coleridge, J., was absent.

(b) The case, on this last point, is reported by H. Davison, Esq.

### RUMBALL and GOUGH against MUNT. *Tuesday, January 20th.*

Buildings and lands were conveyed by B. and G. to N. and R. in fee, to the use of B., G., N. and R. in fee, “upon trust to receive and take, or otherwise permit and suffer the churchwardens” of a parish, “for the time being, yearly for ever to receive and take, the rents, issues, profits and annual payments and proceeds,” “as the same should arise or become payable, for or towards the repair of the parish church,” “and for the benefit of the said parish, so and in such manner as the same had theretofore been usually or lawfully applied and disposed of, and according to the intentions of the several charitable persons who gave or devised the said premises respectively ; they, the said churchwardens, yearly at Easter accounting to the parishioners,” “in vestry assembled for the same.”

Among the parcels conveyed were four cottages, described in the conveyance as situate in the parish, “wherein poor families were permitted to dwell rent-free.”

*Held*, that the property vested, under stat. 59 G. 3, c. 12, s. 17, in the parish officers, and that they were the proper parties to sue for use and occupation of the premises conveyed ; and that such action could not be maintained by the trustees.

DEBT, by trustees for the parish of St. Peter in the county of Hertford, to recover 27*l.* 10*s.* for use and occupation of certain lands, that sum being the amount of half a year’s rent, due at Michaelmas, 1842. Plea, Never indebted. On the trial before Lord DENMAN, C. J., at the Hertford Lent assizes, 1843, a verdict was found for the plaintiffs for 27*l.* 10*s.*, leave being reserved to move for a nonsuit. A rule nisi having been obtained, in Easter term, 1843, for entering a nonsuit, or for a new trial, the court ordered that the facts should be stated for their opinion in a special case ; which was done as follows.

\*383] Thorpe’s Lands, in the parish of Sandridge, in the county of Hertford, being the lands in respect of the occupation \*of which this action was brought, have been from a very remote period (together with certain other lands, cottages, annuities and rent-charges) vested in trustees, and the rents and profits of the same applied to the maintenance and repair of the parish church of St. Peter in the borough of St. Alban,

in the said county, and to the use of the poor of the said parish, in accordance with several charitable bequests and customs to that effect.

By indenture of release, grounded on a lease for a year, the release dated June 14th, 1831, made between James Brown, of, &c., Esquire, William Cannon, of, &c., gentleman, Frederick Gough, of, &c., farmer, and Robert Nicholls, of, &c., auctioneer, of the one part, and the Rev. Charles Richard Manners Norman, of, &c., clerk, Thomas Rogers, of, &c., surgeon, William Harris, of, &c., farmer, Richard Pew, of, &c., builder, John Horner Rumball, of, &c., surveyor, and James Cottle, of, &c., millwright, trustees named for and on behalf of the parishioners of the said parish of St. Peter for purposes after mentioned, of the other part, the said James Brown, &c. (the parties of the first part) did, in consideration of 5s. &c., grant, bargain, sell, alien, release, ratify and confirm to the said C. R. M. Norman, &c. (the parties of the second part,) and their heirs, in addition to certain other messuages, cottages, tenements, lands, grounds, rent charges, annuities, hereditaments and premises, in the said indenture particularly described, (a) "also, all those several closes, pieces and parcels of arable land, meadow," &c., "called [\*384 or known by the name of Thorpe's, containing by estimation forty acres," &c., lying and being, &c., heretofore in the occupation, &c.: habendum to the said C. R. M. Norman, &c., and their heirs, to the use of them the said James Brown, &c., (the parties of the first and second parts,) and their heirs, upon the trusts after declared, that is to say: "Upon trust to receive and take, or otherwise permit and suffer the churchwardens of the said parish of St. Peter for the time being yearly for ever to receive and take, the rents, issues, profits and annual payments and proceeds of all and singular the said hereditaments and premises thereby granted and released, or intended so to be, as the same should arise or become payable, for or towards the repair of the parish church of St. Peter aforesaid, and for the benefit of the said parish, so and in such manner as the same had theretofore been usually or lawfully applied and disposed of, and according to the intentions of the several charitable persons who gave or devised the said premises respectively, they the said churchwardens yearly at Easter accounting to the parishioners of the

(a) The indenture described various messuages, lands and tenements, in the occupation of different persons, not stating any purposes for which they were occupied. It also mentioned the following premises.

"All that messuage or tenement, situate, standing and being in Saint Peter Street, in the said borough of Saint Alban, in the county," &c., "commonly called the parish workhouse, and now in use as such. And also all that other messuage or tenement, situate, standing and being on the south side of the churchyard of the parish of Saint Peter aforesaid, in the borough aforesaid, late in the tenure or occupation of William Harris, and now of Thomas Ruffelt, his undertenants or assigns. And also all those four other messuages, cottages or tenements, situate," &c. "in a certain street or lane called Cock Lane, in the said parish and borough, *wherein poor families are permitted to dwell rent free.* And also all those three other messuages, cottages or tenements in the same lane, forming six dwellings, and *appropriated to the same use*, built by John Masterman, of London, Goldsmith, in lien of three other tenements which formerly stood opposite to a messuage in the said borough, called," &c.

said parish of St. Peter, in vestry assembled, for the same. And that,  
 \*385] when and so often as the said trustees, \*by the death or removal  
 of any of them from the said parish of St. Peter, should be reduced  
 in number to five, in trust that such the remaining five trustees should  
 grant, release, convey and assure the said hereditaments and premises  
 and trust estates unto such other person or persons as should be nomi-  
 nated and appointed in the place or stead of those who should so die or  
 remove, to the use of such persons and the five or other original or  
 remaining trustees and their heirs, upon the trusts and for the intents and  
 purposes thereinbefore declared: to the end that the charitable uses and  
 purposes for which the said hereditaments and premises were originally  
 given might continue for ever according to the intentions of the original  
 donors, and the true intent and meaning of the said indenture. Provided  
 always, and it was thereby declared, that, when and so often as the said  
 trustees, or any or either of them, should remove out of and cease to reside  
 within the said parish of St. Peter, such trustee or trustees so removing  
 and ceasing to reside there as aforesaid should no longer be a trustee or  
 trustees, and the estate and interest of such trustee or trustees so removing  
 and ceasing to reside should thenceforth end and determine, and the same  
 should vest in the remaining or continuing trustees for the purposes  
 aforesaid, any thing therein contained to the contrary thereof in anywise  
 notwithstanding.”

At the time of the rent becoming due in respect of which this action  
 was brought, and at the commencement of this suit, the plaintiffs Rumball  
 and Gough were the only parties to the said indenture of release residing  
 in the parish of St. Peter, the Rev. C. R. M. Norman and R. Pew (both  
 of whom were then living) having some time previously removed from,  
 \*386] and ceased to \*reside in, the said parish, and the rest of the parties  
 to the said indenture being dead. The plaintiff Rumball was  
 one of the churchwardens of the said parish at the time the said rent  
 became due; but Gough was not: and there were also two other church-  
 wardens and two overseers of the said parish at the time the said rent so  
 became due as aforesaid, but who were not made parties to this action.

The case then set out an indenture of March 15th, 1828, whereby the  
 then trustees demised Thorpe's Lands to Harris (afterwards party of the  
 second part to the release of June 14th, 1831) for a term of fourteen years  
 from September 29th, 1828, at a yearly rent, payable to the trustees for  
 the use and benefit of the parishioners, for or towards the repairs and  
 amendments of the church. Also an agreement, dated May 17th, 1831,  
 whereby Harris agreed to underlet Thorpe's Lands to Munt, the defend-  
 ant, for eleven years from September 29th, 1831.

The case further stated, in substance, that the defendant commenced  
 his occupation under the said agreement, and continued in possession up  
 to Michaelmas, 1842. For seven years previous to the half year in respect  
 of which the rent now in question accrued, he had paid rent to the vestry



clerk. The case contained statements, not now material, as to these and prior payments. Harris died about two years before the trial.

The demise to Harris, the release of June, 1831, and the agreement between Harris and the defendant, were, by consent, to form part of the case, if the court should think fit. Three questions were stated for the opinion of the court; the first being:

“Whether the act 59 G. 3, c. 12, s. 17, is \*imperative that the present action should have been brought by the churchwardens and overseers of the parish of St. Peter?” [\*387]

The other two are rendered immaterial by the judgment of the court. (a) If the court should decide either of the first two in the affirmative, or the last in the negative, a nonsuit was to be entered, or a new trial had, as the court should direct.

*Lydekker*, for the plaintiffs. (b) The action is properly brought by the surviving resident trustees. *Doe dem. Jackson v. Hiley*, 10 B. & C. 885, will be relied upon for the contrary proposition; and the marginal note of that case states generally that stat. 59 G. 3, c. 12, s. 17, (c) \*vests in the churchwardens and overseers of the parish all buildings, lands, &c., belonging to such parish, where the profits are applicable to the relief of the poor or purposes for which church rates are levied, “although such buildings, lands,” &c., “had originally been vested in trustees for the benefit of the parish.” But the real import of the decision appears somewhat differently in the judgment of the court delivered by Lord TENTERDEN, who says: “There is nothing in the act of parliament to prevent property held by trustees for the benefit of a parish vesting in the churchwardens and overseers, and it would be very inconvenient that it should be so. It is often difficult for persons who claim under an ancient trust (where the trustees are numerous) to ascertain who was the survivor of those trustees; and even if they succeed in ascertaining that fact, it will not be less difficult to show who is the heir at law of that survivor. Pro- [\*388]

(a) They were as follows:

“2. Whether all the surviving trustees appointed by or in the indenture of the 14th June, 1831, although some of them had removed from and ceased to reside in the parish, ought to have been joined as plaintiffs in the present action.

“3. Whether, under the circumstances, there was any such merger either of the whole or part of Harris’s term as will entitle the plaintiff to the judgment of the court.”

(b) The argument was begun on January 20th, and adjourned to the 23d.”

(c) Stat. 59 G. 3, c. 12, (“to amend the laws for the relief of the poor,”) s. 17, enacts: “That all buildings, lands, and hereditaments, which shall be purchased, hired, or taken on lease by the churchwardens and overseers of the poor of any parish, by the authority and for any of the purposes of this act, shall be conveyed, demised, and assured to the churchwardens and overseers of the poor of every such parish respectively, and their successors, in trust for the parish; and such churchwardens and overseers of the poor and their successors, shall and may and they are hereby empowered to accept, take, and hold, in the nature of a body corporate, for and on behalf of the parish, all such buildings, lands, and hereditaments, and also other buildings, lands, and hereditaments belonging to such parish; and in all actions,” &c., “for or in relation to any such buildings, land,” &c., “or any other buildings, lands,” &c., “belonging to such parish,” “it shall be sufficient to name the churchwardens and overseers of the poor for the time being, describing them as the churchwardens and overseers of the poor of the parish for which they shall act, and naming such parish; and no action,” &c., shall abate by the death, removal, or expiration of office of the churchwardens, &c., named

perty vested in trustees for the benefit of the parish seems equally within the mischief contemplated by the legislature as well as property not so vested." And afterwards his lordship, having discussed the two cases of lands left for the relief of the poor, and lands left to the intent that the revenues may go in aid of the church rate, observes: "In both cases there is the same difficulty of finding out in whom the legal estate in the premises belonging to the parish is vested, and that was the mischief which, by the seventeenth section, the legislature intended to remedy; and we  
 \*389] can see no reason to doubt \*that the operation of that clause was intended to be co-extensive with the mischief." All this reasoning, however, is inapplicable where there are known trustees, as in the present case. In *Doe dem. Higgs v. Terry*, 4 A. & E. 274, which may also be cited, it did not appear that any trustees existed. The judgment of the Court of Exchequer in *Alderman v. Neate*, 4 M. & W. 704, proceeds on the assumption that, in *Doe dem. Jackson v. Hiley*, property conveyed for the benefit of the poor was held to be "in all cases" vested in the churchwardens and overseers. But in *Allason v. Stark*, 9 A. & E. 255, 262, 265, Lord DENMAN, C. J., said: "The statute was passed in remedy of cases where the officers had dealt with property devised for the benefit of the poor without strict title. Can it apply where there are trustees appointed and known?" PATTESON, J., asked: "If it was intended, in all cases, to transfer the legal estate to the parish officers, why not at once enact, in express terms, that it should be so transferred?" And Lord DENMAN, C. J., in his judgment, said: "The language of Lord TENTERDEN, in *Doe dem. Jackson v. Hiley*, is certainly very large; but it must be taken with reference to the case then before him, in which the question was, whether the lands could there be considered as belonging to the parish. That case is satisfactorily explained by the fact that no feoffee appeared, nor any other person in whom the legal estate was vested. Stat. 59 G. 3, c. 12, was not intended to strip all trustees of their estates merely because the parish derived some benefit from the trust." Afterwards, in *Attorney-General v. Lewin*,  
 \*390] 8 Sim. 366, the Vice \*Chancellor denied the general proposition, deduced, in argument, from *Doe dem. Jackson v. Hiley*, that the seventeenth section vests in the churchwardens and overseers "all property that is held for parish purposes." And, in the case *In re Paddington Charities*, 8 Sim. 629, where the same decision of this court was cited, the Vice Chancellor held that the enactment applied "to freehold lands held generally in trust for the parish," but not to copyholds: and he added: "Nor, in my opinion, does the statute apply to freeholds held upon any special trust." The court, therefore, is not called upon by the decisions on this clause to give it the unlimited operation which will be argued for on the other side, nor to say that mere permissive words ("shall and may" and "it shall be sufficient") can divest actual trustees of their estate and transfer it to other parties. In the act 5 & 6 W. 4, c. 69, "to facilitate the conveyance of workhouses and other property of parishes and of

incorporations or unions of parishes," sect. 3, a distinction is recognised between "land, effects, or other property belonging to any" "parish or union," and land, &c., "vested in trustees or feoffees in trust for such parish or union, or for the parishioners," &c. (The argument on the other points is omitted.)

*Petersdorff*, contrà. In *Alderman v. Neate*, it was contended that stat. 59 G. 3, c. 12, s. 17, left it optional in the parish officers, whether they would take the property or not: but the court held that there was no discretion, and that the property, by the statute, vested absolutely. Their language on this point is: "That \*question has been ingeniously [\*391 argued before us; we do not, however, consider it as being res integra, inasmuch as it has been decided by the Court of Queen's Bench that the statute does apply in all cases; and as the agreement here is a grant of property to be used for a poorhouse, we think it is within the provisions of the statute, and accordingly that the property is vested in the overseers for the time being." Here the object is clearly that the profits of the land shall be applied for parochial purposes: the churchwardens are annually to account to the parishioners: in effect, nothing is given to the trustees but the pure legal estate. In *Ex parte Annesley*, 2 Y. & C. Exch. 350, there were feoffees in trust for the relief of the poor of a parish: and it was held "that the charity estates were taken out of the feoffees by the stat. 59 G. 3, c. 12, s. 17, and vested in the churchwardens and overseers of the parish." The cases in this court are uniformly to the same effect; *Doe dem. Higgs v. Terry*; *Doe dem. Hobbs v. Cockell*, 4 A. & E. 478; *Doe dem. Edney v. Rillett*, 7 Q. B. 976, 980, 983. The dictum from *In re Paddington Charities* cannot be considered as controlling these authorities so far as to destroy the application of the statute to a case where, as here, the trusts are entirely parochial. [*Lydekker*. Here the trusts are special: certain families are allowed to reside rent-free.] (*Petersdorff* was then stopped by the court.)

LORD DENMAN, C. J. We must act on the decisions which have settled that the churchwardens and overseers must be considered as owners. There is no trust \*here beyond that which is contemplated by [\*392 giving to the parties named in the conveyance the character of trustees. They have their general character only. The only argument which can be urged for an opposite construction is that arising on the word "sufficient," in sect. 17, from which it is inferred that the churchwardens are not necessarily to be named. But the word is there used merely to avoid the difficulty arising from the parish officers being a fluctuating body: and the provision does not exclude the necessity of treating them as the owners, but only enables parties to describe them in the form there given.

PATTESON, J. *Doe dem. Jackson v. Hiley*, 10 B. & C. 885, has often been attacked; but I think it has never been overruled: indeed, it has often been upheld, particularly in *Alderman v. Neate*, 4 M. & W. 704.

The enactment has been held to be not merely prospective, and not confined to buildings, lands, &c., afterwards to be conveyed, which the parish officers "are hereby empowered to accept," but to include also "all other buildings, lands," &c., "belonging to such parish." Now I think that we have already had the meaning of the word "belonging" discussed, and have held that it applied to all cases where the lands were given for the use of the parish generally, (a) though not to those where the trusts were for purposes not entirely parochial. But I find no trusts of the latter sort in this case. The trusts are for the "repair of the parish church," "and for the benefit of the said parish." So far, the trusts are entirely

\*393] parochial. Then follow \*the words "according to the intentions of the several charitable persons who gave or devised the said premises respectively." I do not well know what these words mean. The part pointed out by Mr. *Lydekker* (as to residence of certain families rent-free) is merely descriptive of the premises. I am therefore of opinion that the purposes here are entirely parochial, and the property vested in the parish officers.

COLERIDGE, J. It is too late now to argue, as the learned counsel for the plaintiffs has done, that the vesting of the property is merely optional. The words "empowered to accept, take and hold," are not indeed ordinarily equivalent to words absolutely enacting that property shall vest: but I think they are enough, in this statute, to justify the construction put upon them. Looking at the decisions in *Doe dem. Higgs v. Terry*, 4 A. & E. 274, and *Alderman v. Neate*, 4 M. & W. 704, we must say that the parish officers are to hold this property: if they are to hold, there cannot be other parties in possession. Can we say that one set of owners are to be plaintiffs in ejectment and another set plaintiffs in an action for use and occupation? We must hold that the property vests for all purposes, if for any, in the parish officers. Then, as to the extent of the trust. Without referring at present to the words relied upon by Mr. *Lydekker*, we are to look to the general object. We have not to select a particular part of the premises as belonging to the parish. As has been said here before, (b) the word "belonging" is to have a popular not a technical

\*394] meaning: \*technically, lands cannot belong to a parish. Then the only question here is, whether there are special trusts. Mr. *Lydekker* points out that certain families are described as being allowed to reside rent-free. But it is not provided that they shall be allowed to reside rent-free: the words occur merely by way of description of the parcels; and therefore they raise no special trust.

Judgment for defendant.(c)

(a) See the judgments of Patteson and Coleridge, Js., in *Doe dem. Higgs v. Terry*, 4 A. & E. 274; *Allason v. Stark*, 9 A. & E. 255.

(b) See ante, p. 392, note (a).

(c) Wightman, J., was absent.  
See *Uthwatt v. Elkins*, 13 M. & W. 772. And see the next case.

The following case, decided in Michaelmas vacation, 1847, may properly be inserted here.

**The Churchwardens and Overseers of the Poor of ST. NICHOLAS, DEPTFORD, against SKETCHLEY. *Saturday, December 11th, 1847.***

In 1749, land was conveyed by deed to trustees, upon trust to permit the churchwardens and overseers for the time being of a parish to receive the rents, &c. to and for the use and benefit of the poor of that parish: and the deed gave the trustees for the time being power to lease for twenty-one years.

*Held* that, although the trusts were general, still the legal estate was not vested in the parish officers by stat. 59 G. 3, c. 12, s. 17; because there were known existing trustees under the deed, and the provisions of the statute were insufficient to divest their estate.

**DEBT.** The action was brought to recover 18*l.* 0*s.* 9*d.*, for the use and occupation of premises comprised in the indenture of March 27th, 1749, hereinafter mentioned. (a) By consent and a judge's order, after issue joined, the following case was stated for the opinion of this court: and the above-mentioned sum, which had been paid into court, was ordered to abide the decision.

\*By an indenture of bargain and sale, bearing date 27th March, 1749, duly executed and enrolled in Chancery, between Sir John Evelyn, therein described as of Wootton in the county of Surrey, Bart., of the one part, and John Evelyn, son and heir apparent of the said Sir John Evelyn, Bart., and the Rev. Thomas Anguish, vicar of the parish church of St. Nicholas, in Deptford, in the county of Kent, clerk, of the other part, the said Sir J. Evelyn, for the purposes and considerations therein mentioned, did grant, bargain and sell unto the said John Evelyn the son, and Thomas Anguish, and their heirs, a certain piece or parcel of garden ground therein described, &c.; to hold the same unto the said John Evelyn the son, and Thomas Anguish, their heirs and assigns, for ever, upon trust nevertheless, and to and for the intents and purposes, and under the provisoes thereafter mentioned, (that is to say:) Upon trust to permit and suffer the churchwardens and overseers of the poor for the time being of St. Nicholas, in Deptford, to receive the rents and profits of the said piece or parcel of garden ground and premises to and for the use and benefit of the poor of the said parish of St. N., in D., aforesaid: And upon further trust, that, upon the decease of the said John Evelyn the son, or of the said Thomas Anguish, then the survivor of them should (at the costs and charges of the churchwardens and overseers of the poor for the time being of St. N., in D., aforesaid) convey the said piece or parcel of garden ground unto the heir male of the body of the said John Evelyn the son, or to the succeeding vicar of St. N., in D., aforesaid, as the case might require, and so, from time to time upon every decease of a

(a) The action was first brought against Thomas Jenkins: but, he disclaiming any interest in the subject matter, and alleging that the right thereto was claimed by the Rev. Alexander Everingham Sketchley, a judge's order was made, staying proceedings, and substituting Sketchley as defendant for Jenkins, who paid the money demanded into court.



trustee, the survivor should convey the said premises in such manner  
 \*396] \*as that the heir male of the said John Evelyn the son, and the  
 vicar of St. N., in D., for the time being, should always be the  
 trustees upon the trusts thereinbefore mentioned. And it was thereby  
 also declared that the trustee or trustees for the time being should, at the  
 request, costs and charges of the said churchwardens and overseers of the  
 poor of St. N., in D., let and demise the said piece or parcel of garden  
 ground and premises, to any person or persons, for any term or number  
 of years not exceeding twenty one years in possession and not in rever-  
 sion, by indenture, and for the best improved rents that could be reason-  
 ably had or gotten for the same.

Under and by virtue of the said indenture, and of a conveyance, made  
 in pursuance thereof, of the legal estate in the said hereditaments and pre-  
 mises, bearing date 28th June, 1806, and also by, under and by virtue  
 of the provisions of an act of parliament, made and passed in 55 G. 3, (a)  
 intituled "An act for better carrying into execution the trusts of certain  
 charity lands at Deptford in the county of Kent," the said hereditaments  
 and premises comprised in the said indenture of 27th March, 1749, and  
 thereby conveyed, &c., as aforesaid, became and were before and at the  
 time of the passing of another act of parliament, made, &c., (59 G. 3, c.  
 12,) intituled "An act to amend the laws for the relief of the poor," abso-  
 lutely vested in the Rev. John Drake, D.D., (b) the then vicar of the said  
 parish of St. N., in D., and his successors in the said vicarage;  
 \*397] \*upon the trusts nevertheless, and for the ends, intents and pur-  
 poses, expressed and contained of and concerning the said here-  
 ditaments in the said indenture of the 27th March, 1749.

After the passing of the said act, 55 G. 3, the said John Drake, D. D.,  
 as such vicar as aforesaid, at the request of the churchwardens and over-  
 seers of the poor for the time being of St. N., in D., granted building  
 leases of parts of the said hereditaments and premises for long terms of  
 years. And such leases contained covenants by the respective lessees  
 therein named to and with the said John Drake, his heirs and assigns,  
 and his successors, vicars for the time being of St. N., in D., for the pay-  
 ment of the rents therein reserved; and such leases also contained pro-  
 visoes whereby rights of re-entry were reserved to the said John Drake,  
 his heirs and assigns, and his successors, vicars of the said parish for the  
 time being, in case of non-payment of such rents or non-observance or  
 non-performance of the covenants therein contained.

By an indenture dated 16th December, 1843, and made, as to a lease  
 for a year, in pursuance of stat. 4 & 5 Vict. c. 21, between Jeremiah  
 Selmes and William Knott, therein described as churchwardens of St. N.  
 in D., and James Archer, John Dyball and Richard Tuckett, therein de-

(a) Cap. 69, Private. It was agreed that this act, and an act, 46 G. 3, c. cxliii. (local and personal, public) therein referred to, should be taken as part of the case. Some clauses of these acts, not set out in the case, are stated in the judgment, post.

(b) See p. 401, post



scribed as overseers of the poor of the same parish, of the first part; the Rev. John Drake and Thomas Drake, therein described as the only surviving sons, and William Wickham Drake and Francis Drake, therein described as the surviving grandsons, (and all together the coheirs at law, according to the custom of gavelkind, of the said Rev. John Drake, D. D., deceased, in the said conveyance of 1806 and the said \*acts of parliament named,) of the second part; and the said defendant, the Rev. A. E. Sketchley, clerk, therein described as then vicar of St. N., in D., of the third part; the said hereditaments and premises were duly conveyed and assured by the said John Drake, (the party to the now stating indenture,) Thomas Drake, William Wickham Drake and Francis Drake, at the request, and with the privity, consent, and approbation, of the said several churchwardens and overseers of the poor, parties thereto of the first part, unto and to the use of the said A. E. Sketchley, his heirs and assigns, upon the trusts, and for the same estates, ends and purposes, and under the same powers, provisoes, declarations and agreements, as were by the said indenture of 27th March, 1749, declared concerning the same, and were then existing. No notice of his desire to be joined in the trust has been given by any heir male of the said John Evelyn the son, in pursuance of the statute 55 G. 3, c. 69.(a) [\*398]

The rents and profits arising from the said hereditaments and premises have been from time to time distributed amongst the poor inhabitants of the parish not receiving parochial relief, and not otherwise, in aid of the parish rates, or for the general purposes of the parish.

The Rev. A. E. Sketchley, when the rent now in question accrued and became due, and before and at the time of the commencement of the action, was, and still is, vicar of St. N., in D. And, by virtue of the several hereinbefore recited indentures, and of the said acts of 46 & 55 G. 3, the said hereditaments and premises were, and are now, vested in the said A. E. Sketchley, as such vicar, upon the trusts contained in the said indenture of \*27th March, 1749; and he was and is the party entitled to exercise all the powers and perform all the duties and trusts granted and imposed by the said last-mentioned indenture and the said statutes, unless the same have been divested, altered or transferred by stat. 59 G. 3, c. 12, s. 17. [\*399]

The churchwardens and overseers contended that, by that act, sect. 17, the legal estate in the said hereditaments and premises, and the right to the rent in dispute, were vested in them; and that the operation of the provisions of that act was to divest the vicar of any estate and interest in the said hereditaments and premises, and transfer them to the churchwardens and overseers.

The vicar contended that the estate, &c. in the said hereditaments, &c. vested in him, as the vicar for the time being, by the said indentures and

(a) See the judgment, pp. 401, 402, post.

by the statutes of 46 & 55 G. 3, was not divested nor in any manner affected by the enactments of stat. 59 G. 3, c. 12, s. 17.

The question for the opinion of the court was whether, under the circumstances, the legal estate and interest in the said hereditaments and premises still continued vested in the vicar for the time being of the said parish of St. N., in D., or were vested in the churchwardens and overseers of the said parish under stat. 59 G. 3, c. 12, s. 17. Should the court be of the former opinion, judgment was immediately to be entered for the defendant, who was to be entitled to receive out of court the sum of 18*l.* 0*s.* 9*d.*; but, should the court be of the latter opinion, judgment was to be entered for the plaintiffs without costs, and they were to receive the said sum, &c.

\*400] The case was argued in Trinity term, 1847.(a) The \*cases, and the points discussed, are noticed so fully in the judgment of the court that a detailed report of the argument is considered unnecessary.

*Malins*, for the plaintiffs, cited *Doe dem. Jackson v. Hiley*, 10 B. & C. 885; *Doe dem. Higgs v. Terry*, 4 A. & E. 274; *Doe dem. Hobbs v. Cockell*, 4 A. & E. 478; *Alderman v. Neale*, 4 M. & W. 704; *Gouldsworth v. Knights*, 11 M. & W. 337; *Doe dem. Edney v. Billett*, 7 Q. B. 976; *Rumball v. Munt*, ante, p. 382; *Ex parte Annesley*, 2 Y. & C. Exch. 350; *Allason v. Stark*, 9 A. & E. 255; *In re Paddington Charities*, 8 Sim. 629.

*Badeley*, for the defendant, cited *Attorney-General v. The Corporation of Exeter*, 3 Russell, 395; *Shelford on Mortmain*, p. 629, c. 5, s. 3, § 2; *Attorney-General v. Clarke*, Ambler, 422; *The Attorney-General v. Wilkinson*, 1 Beavan, 370; *Attorney-General v. Gutch*, cited, *Shelf. on Mortm.* 628, 4 Burn's Justice, 1022, Chitty's (28th) ed. (p. 1315 in ed. 29;); *In re Chertsey Market*, 6 Price, 261; *Attorney-General v. Lewin*, 8 Sim. 366; *The Attorney-General v. Freeman*, 5 Price, 425.

He contended, also, that the churchwardens were estopped by their sanction as parties to the conveyance of 1843, and cited Co. Lit. 352 a, and *Trevinan v. Lawrance*, 1 Salk. 276.

*Malins*, in reply, contended that the deed was no estoppel, as it was executed after the passing of stat. 59 G. 3, c. 12, under a misapprehension on the part of \*the parish officers, and at a time when the coheirs of Drake had no estate. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court.

The defendant claims to hold the lands in question as a special trustee of a charity founded in March, 1749. The trusts are, to suffer the churchwardens and overseers to receive the rents to and for the use and benefit of the poor of the parish. By the original foundation deed the trustees for the time being had power to lease for twenty-one years in possession at the best improved rent. By a local act, 46 G. 3, c. cxliii.(b)

(a) June 8th. Before Lord Denman, C. J., Patteson, Coleridge, and Erle, Js.

(b) "For enabling the trustees of charity lands at Deptford, in the county of Kent, to grant building leases thereof."

reciting that it would be beneficial if the *trustees for the time being* were enabled to grant long leases, Sir Frederick Evelyn and John Drake, then vicar, their *heirs and assigns*, were enabled to grant building leases for ninety-nine years. The original foundation deed had provided that *the heir male of the founder's son John Evelyn, and the vicar for the time being*, should be always the trustees; but, by an act passed, 55 G. 3, c. 69, (Sir John Evelyn, the then heir male, being non compos mentis,) the legal estate was vested in John Drake, the then vicar, as such, and *his successors* in the said vicarage *during the lunacy of the said Sir John Evelyn*. The second section, however, enacts that the person who for the time being should answer the description of heir male of the said John Evelyn, if desirous of being joined in the trust, might at any time give three months' notice to the vicar for the time being, who would then be bound to convey \*to him; and, by sect. 3, any act, deed or assurance, done [\*402 or made by the vicar alone, after three months' neglect to comply with the requisition, would be void; but, in case of no such notice, or so often as such heir male shall be minor, lunatic, beyond seas, under any legal disability, or refuse or become incapable to act in the trusts, the vicar may act alone. By the fifth section the churchwardens and overseers, on receipt of the rents, are to pay the same to the treasurer of the poor-rates for the time being, to be applied by the governors and directors of the poor conjointly with them *according to the trusts of the original foundation deed*. Independently of title under this statute, the defendant claims under a conveyance in 1843, from the coheirs of John Drake, with the consent of the churchwardens and overseers, to the use of himself, *his heirs and assigns*, upon the trusts of the original foundation deed. No notice has been given under stat. 55 G. 3, c. 69, by the heir male of John Evelyn.

The case finds in substance, and, as between these parties, we are to take it, that the defendant is well entitled, (and, if well entitled, it must be as trustee for the performance of the original trusts, and those engrafted on them by stat. 46 G. 3,) unless his title is displaced by the operation of stat. 59 G. 3, c. 12, s. 17; and on this the lessors of the plaintiff rely, contending that, in all cases where the land is freehold, and the trusts are general for the benefit of the parishioners, so that in a popular sense the land may be said to belong to the parish, the statute vests the legal estate in the churchwardens and overseers of the parish as a body corporate. The defendant contends that in no case does the statute operate where the legal estate is actually \*vested in a known existing trustee or [\*403 trustees; and that at all events it does not operate where the trusts are special, which he asserts to be the case in the present instance; for that a trust for the benefit of the poor is a trust limited to such poor as do not receive parochial relief, constituting therefore a special and limited class of objects.

The latest case on this subject is *Rumball v. Munt*, antè, p. 382.

There the trusts appear by the last conveyance to have been to receive and take, or to permit and suffer the churchwardens for the time being yearly for ever to receive and take, the rents, &c., for the repairs of the parish church, and for the benefit of the poor of the parish, so as the rents, &c., have been usually or lawfully applied, and according to the intentions of the several charitable persons who gave the premises respectively. It appeared also that among the premises were four messuages, wherein it was stated in the conveyance "poor families" were "permitted to dwell rent free." For the last seven years the defendant had paid rent to the vestry clerk. In that case both points were made on which the defendant now relies, that the trusts were special, and the trustees in existence. This court, however, determining that the trusts were general, decided that the parish officers alone could sue for the rent, and did not regard the known existence of the trustees as preventing the operation of the statute. If, therefore, that case was in all points rightly decided, it governs the present: and we have in effect been called on by the defendant's counsel to review that decision. Certainty in the law is

\*404] of such paramount importance, that a decision, \*although questionable in itself, which has been acquiesced in by the co-ordinate courts, and has been acted on as law for any considerable period of time, may be better left for correction to some superior and more authoritative tribunal than departed from by the same court in subsequent cases; but, if these circumstances do not exist, and we should be satisfied on reconsideration that our earlier decision was erroneous, there is nothing which should prevent us from so declaring, when the same circumstances again present a case for our decision. We have therefore thought it more satisfactory not to preclude the present inquiry.

Two points, it will be observed, are alleged to be cardinal: the special nature of the trusts; the existence of the special trustees. Of these we think the first does not arise in the present case. Whether, under a trust "for the use and benefit of the poor of the said parish," all the poor persons, receiving relief from the poor-rate or not, be proper objects, or only the latter, it seems to us that, in the latter case as well as in the former, the trusts are sufficiently general to bring the case within the operation of the statute. In the cases relied on for a different construction, it will be found that the trusts either wholly or in part are such as limit the discretion of the trustees, confine them to special objects or special modes of relief, the latter being such as could not properly fall on the general parochial fund if there was no such charitable fund. Thus, in the *Attorney-General v. Lewin*, 8 Sim. 366, the trusts were, among others, the "binding one poor boy," not boy or girl, "apprentice in each year," and "instructing the poor of the parish:" in the \**Paddington Charities* case, (a) the purchase of bread and cheese to be distributed among

(a) *In re Paddington Charities*, 8 Sim. 629; S. C. 7 L. J. (N. S.) Eq. Ca. 44. The latter report is cited above.

the poor at Christmas: in *Allason v. Stark*, 9 A. & E. 255, "the better relief of the most poor and needy people that be of good life and conversation," inhabiting within the said parish, "and the putting forth one poor boy or more, being of the said parish, to be apprentice or apprentices," the moiety to the poor "to be paid to them *every half year, &c., at and in the church or porch* thereof." Where the only distinction is the actual receipt of parochial relief, it is obvious that the result is the same as if it did not exist; the fund helps to keep off the rate those who, it is feared, would otherwise be at least temporarily on it: it is in aid of the parochial funds; and the land which produces it may therefore properly be said, in the popular sense in which the statute must certainly be construed, to belong to the parish. In this holding we differ from no decision, and we agree with many, which it is unnecessary in this part of our judgment to refer to.

The second point, that the statute does not vest the legal estate in the parish officers, where there are known trustees in existence, will require more consideration. The seventeenth section of the statute, (a) on which the whole turns, enacts that all buildings, &c., which shall be purchased by the churchwardens, &c., under the authority and for any of the purposes of the act, shall be conveyed to them and their successors in trust for the parish; and such churchwardens, &c., and their successors "*shall and may and they are hereby empowered* to accept, take and hold, in the nature of a body corporate, for and on behalf of the parish, all such buildings," &c., "*and also all other buildings, lands and hereditaments belonging to such parish.*" The former part of the sentence is entirely prospective; it regards future purchases and leases; it is addressed to the conveying party as well as to the grantees; and these last it not merely empowers to take, but throws upon them the obligation of taking in a certain capacity and with certain trusts: and it is confined to buildings, &c., taken under the authority and for any of the purposes of the act. The latter part of the sentence, which seems to have been an afterthought engrafted on the original scheme of the section, is merely retrospective; it is confined to property already in some sense belonging to the parish; much of the preceding part, to which it is grammatically appended, is therefore inapplicable to it. So much of it as is, if it be separated from the rest, will run thus: "The churchwardens, &c., shall and may, and they are hereby empowered to take and hold, in the nature of a body corporate on behalf of the parish, all buildings, lands, and hereditaments belonging to the parish." However we limit the meaning of the words "all buildings, &c., belonging to the parish," within those limits it cannot be contended that the statute is *merely* enabling: besides the obvious inconvenience of leaving to the parish officers an option to take or not that which the statute intended them to take, the words will not bear that meaning. The parish officers "*shall take*,"—this casts

(a) *Ante*, p. 387, note (c)

the duty on them ; and they “*are empowered to take,*”—this gives them the legal capacity for performing it. It would be conceded probably that in a case where the trusts were general for the parish benefit, and the

\*407] trustees were all dead, and no \*representative could be found, the parish officers *could not repudiate* the legal estate and the attendant trusts ; the former would vest in them, and the latter be cast on them, without any act of their own, with no power of refusal in them, by the mere operation of the statute.

If this be so, the defendant must be driven to contend that lands, &c., are not belonging to the parish in the sense of the statute if the legal estate be vested in known existing trustees, or that those words must be read with this implied addition, “whereof there are no existing trustees, or none that can be found,” in order to take such a case as the present out of the operation of the statute. The difficulty in assenting to this latter proposition seems to be, that it puts a large limitation on words in themselves unambiguous, while there is nothing in the context of the section, or the general provisions of the statute, which manifests any clear intention in the legislature so to narrow the meaning of its own language. In *Allason v. Stark*, 9 A. & E. 262, PATTESON, J., is reported to have asked, in the course of the argument : “If it was intended, in all cases, to transfer the legal estate to the parish officers, why not at once enact in express terms, that it should be so transferred?” A very pertinent question, certainly ; but, if we limit them to the sense contended for by the defendant’s counsel, the question may equally be asked, why not enact that sense in express terms? No words declare that the only mischief to be remedied was the case of property belonging to the parish, which it was difficult to manage, or protect, or recover, for want of strict title in any known person. No doubt that case, as it is within the words, so it

\*408] was also within the intention of the \*legislature ; and it is very convenient so to provide for it : but it may have been equally thought convenient to provide for all cases where the trusts are generally for the benefit of the parish, by placing the administration of them in the same hands in which by the general law is placed the administration of the general fund. It may have been thought that those who distribute relief to the poor on the parish books would know best the circumstances and character of those who either by temporary pressure or decay are all but on them. Much reliance therefore cannot be placed on the argument of intention or convenience in favour of the defendant’s limitation.

We attach much more weight to the argument, that the section contains no words expressly divesting an estate from living trustees ; none which direct such persons to convey their legal interests to the parish officers.

There will always be a difficulty when the legislature, dealing with a matter in its nature precise and technical, such as the title to land, or the vesting of estates, makes use of merely popular language ; and considerable latitude of construction, however inconvenient, becomes necessary,



in order to arrive at and effectuate the intention. But it is a safe rule to require that, in order to divest an estate, there should be either express words or necessary implication; to avoid such interference with existing legal interests, a more narrow construction than the words in themselves might admit of is properly to be adopted. Where a founder has constituted a body of trustees, and charged them with the execution of certain trusts for the benefit of the poor of the parish, however general in their nature, \*and these trustees are in existence, and in the actual discharge of the trusts imposed on them, it would be a strong act [\*409 in the legislature by direct words to take from them their property, and vest it in the parish officers; and, if it has only used words which may receive a sufficient meaning, and remedy a great inconvenience, without going that length, we think, on general principles, we ought not to allow them to go further. It is not unreasonable in itself to say that property so circumstanced does not belong to the parish. With the exception of *Rumball v. Munt*, antè, 382, the authorities favour this view. They begin with *Doe dem. Jackson v. Hiley*, 10 B. & C. 885: there it was unknown or uncertain in whom the legal estate, originally in the feoffees, was vested; and Lord TENTERDEN says, (p. 894,) that the difficulty of finding out in whom the legal estate in the premises belonging to the parish is vested was the mischief which by the seventeenth section the legislature intended to remedy. The same fact existed in *Doe dem. Higgs v. Terry*, 4 A. & E. 274, and in *Doe dem. Hobbs v. Cockell*, 4 A. & E. 478. *Alderman v. Neate*, 4 M. & W. 704, does not raise the precise point: but there the parish officers for fifty years had been in occupation and paid the rent; they were held liable; and the case was decided distinctly on the authority of *Doe dem. Jackson v. Hiley*. *Allason v. Stark*, 9 A. & E. 255, was decided on the special nature of the trusts; but, on the particular point we are now considering, it contains observations by nearly all the judges favouring the view we are now taking, and explaining the former decisions, in *Doe dem. Jackson v. Hiley*, and *Doe dem. Higgs v. Terry*, by the difficulty which existed in \*them of ascertaining [\*410 where the legal estate of the original trustees was. We have already alluded to the cases in equity: and the decision in *Rumball v. Munt* we have already stated to be in favour of the lessors of the plaintiff.

Upon this view of the authorities, and consideration of the principle on which the statute ought to be expounded, we have come to the conclusion that our judgment ought to be for the defendant.

Judgment for defendant.

The QUEEN against the Churchwardens and Overseers of the Parish of BIRMINGHAM.

(CHELTENHAM against BIRMINGHAM.) *Wednesday, January 21st.*

The grounds of appeal against an order removing a widow, with her children, to her maiden settlement, were: 1. That the order and examinations were bad and insufficient on the face thereof respectively. 2. That there was no legal evidence of chargeability, and that the examinations do not prove relief. 3. That no legal evidence of relief was given. 4 and 5. That the examinations do not show any proper search for the settlement of the pauper's late husband. 6. That the justices had not jurisdiction to remove without evidence that the husband had no settlement, or none that could be discovered; and that the order was made without such evidence. 7. That the widow could have given information as to his settlement. 8. That the order describes the eldest son as legitimate, whereas the evidence on which it was made shows him to be a bastard. *Held:*

That, the general ground of appeal being followed by specific ones alleging defects in the examinations, the appellants could not, under the general ground, object to the examinations for a cause not particularly specified; as, that they did not show a legal hiring and service, (on which the widow's settlement depended;) or that the jurat was imperfect.

The order, dated August 26th, 1844, purported to adjudicate on the settlement of "A. B., widow, and four of her children, viz., Henry, aged nine and a half years, James," &c. By the examinations it appeared that Henry was illegitimate, and of the age mentioned. *Held*, that the word "children," standing alone, meant legitimate children; and that Henry was therefore misdescribed, and the order, as to him, bad.

The widow, in her examination, said: "I never knew or saw any relation of my late husband; nor can I tell to what parish or place he belonged." Nothing further appeared as to his settlement. *Held*, that the widow was removable to her maiden settlement without further inquiry by the respondents as to the settlement of her husband.

On appeal against an order of justices removing Anne Brown and her four children from the parish of Birmingham in the borough of Birmingham, \*Warwickshire, to the parish of Cheltenham in Gloucestershire, the sessions quashed the order, subject to the opinion of this court upon the following case.

The examinations, so far as it is necessary to set them forth, were as follows.

"Borough of Birmingham," &c. "The examination of Anne Brown, widow, now residing in Grosvenor Street West, in the parish of Birmingham, touching her settlement, taken upon oath before us, two of her majesty's justices of the peace in and for the said borough of Birmingham in the said county of Warwick, this 26th day of August, 1844. The said Anne Brown says: 'I am about thirty-three years old; my maiden name was Anne Young. In the year 1830, being then an unmarried woman without child or children, I hired myself for a year as housemaid at 5*l.* wages, a month's wages or a month's warning, to Mr. Only of St. John's Cottage, Hewlett's Road, in the said parish of Cheltenham, builder. I continued in that service fifteen months, and then gave a month's notice, and left the same and received the whole of my wages during the whole of my said service; and for the last forty days thereof I resided and slept in my master's house in the said parish of Cheltenham, and was all the time an unmarried woman, not having a child or children. I was never afterwards hired for and served a whole year. In the year 1835 I inter-

married, at Aston church near Birmingham, with my late husband Thomas Brown, who died in March last, by whom I have five children,—William, eleven, born before marriage, in April 1833; Henry, nine and a half, born before marriage, in December, 1834; James, seven; Eliza, four and a half; and Edwin, two years old. The \*three last-mentioned [\*412 children were born in wedlock. I never knew or saw any relation of my late husband; nor can I tell to what parish or place he belonged. I have applied to one of the relieving officers of Birmingham, and have received relief from the said parish of Birmingham weekly in money, and bread, or flour, for the support of myself and family for five months past. I and my family are now actually chargeable to the said parish of Birmingham.'

Mark of X ANNE BROWN.

"Sworn before us, C. R. MOORSOM. THOMAS BEILBY."

"Borough of Birmingham," &c. "The information," &c. "of William Warner Bynner, taken on oath," &c. (as in the preceding examination.) "Who saith that Anne Brown, widow, and four of her children, Henry, aged nine years and a half, James," &c. (stating names and ages of the children James, Eliza and Edwin,) "have come to inhabit in the parish of Birmingham in the said Borough of Birmingham, not having gained a legal settlement there, nor produced any certificate," &c., "and that the said A. B. had made application to one of the relieving officers of the said parish of Birmingham for parochial relief for herself and family, and that she, the said Anne Brown, hath, for five months last past, received weekly relief in money, and bread and flour, at the charge of the said parish of Birmingham: and that she and her family aforesaid are now actually chargeable to the said parish of Birmingham: and thereupon he, this informant, prayeth that justice may be done.

"Taken, sworn and acknowledged before us, the day and year above written.

C. R. MOORSOM.

THOS. BEILBY.

WM. WARNER BYNNER."

\*The case then set forth the order of removal, (dated August 26th, 1844,) which recited, in the usual form, the complaint of the churchwardens and overseers of Birmingham, "that Anne Brown, widow, and four of her children, viz. Henry, aged nine years and a half, James, seven years, Eliza, four years and a half, and Edwin, two years old, have come to inhabit in the said parish," &c., "not having gained," &c., "nor produced," &c., "and that the said A. B. and the said four children are actually chargeable," &c. The order then proceeded: "We, the said justices, upon due proof made thereof, as well upon the examination of the said A. B. upon oath as otherwise, and likewise upon due consideration had of the premises, do adjudge the same to be true; and we do likewise adjudge that the lawful settlement of them the said A. B. and Henry, James, Eliza and Edwin, the said four children, is in the said

parish of Cheltenham, in the said county of Gloucester. We do therefore," &c. The order then directed the churchwardens and overseers of Birmingham, in the usual form, to remove "the said A. B. and the said four children," &c.

The case then stated the following as "the grounds of appeal material for the consideration of this court." (a)

1. That the said order, and the examinations on which the same appears to have been made, and the notice of chargeability, accompanying the same, and each and every of them, is bad and insufficient on the face thereof respectively.

5. That the adjudication of chargeability was made without legal evidence; and that W. W. Bynner, the examinant, does not prove on the face of his examination that he ever gave relief to the said Anne Brown; \*414] nor does it appear how he gained his knowledge that any relief was given to her at the charge of the said parish of Birmingham.

6. That no fact of relief was legally proved before the said justices to enable them to adjudge that the said Anne Brown was actually chargeable to your said parish, or that she and her said children might be lawfully removed by their order therefrom.

8. That the said examinations on which the said order was founded do not show that any search, inquiry or endeavour was made by the churchwardens and overseers of the said parish of Birmingham, or by any of them, or by any person or persons on their behalf, to discover the settlement of Thomas Brown, the deceased husband of the said Anne Brown, before the making of the said order of removal.

9. That the said examinations do not show that any proper or sufficient search was ever made for the settlement of the said T. Brown.

10. That the said justices had no jurisdiction to make the said order to our said parish as the place of the maiden settlement of Anne Brown without reasonable and satisfactory evidence being adduced and given before them that the said T. Brown had no settlement, or that his settlement could not be discovered: and that the said justices made the said order without any such evidence.

11. That the said Anne Brown could have given information by means whereof the settlement of the said T. Brown might have been discovered.

12. That the said order is bad in this, that it describes the eldest son Henry as if he was legitimate, whereas the evidence on which the said order was made shows that he was a bastard.

\*415] At the hearing of the appeal it was objected, on the part of the appellants, under the first ground of appeal, that it did not appear on the face of the examinations that the pauper Anne Brown gained a settlement by hiring and service, it being alleged by the appellants that it is nowhere shown that the service of the said Anne Brown in her examination mentioned was under any hiring for a year, nor that there was an

(a) No others were noticed in the case.

uninterrupted service for a year under any hiring connected with the hiring for a year in the examination mentioned. In answer to this it was contended, for the respondents, that the appellants were not entitled under their said first ground of appeal to be heard on the objection taken by them ; and, secondly, that the examination was legally sufficient to support a settlement by hiring and service. The Recorder was of opinion that the appellants were entitled, under their first ground of appeal, to be heard on this objection ; and, secondly, that the examination of Anne Brown did not show a sufficient legal settlement by hiring and service ; and quashed the said order of removal, subject to the opinion of this court on both these points.

It was further objected on the part of the appellants, at the same time :

1. That it nowhere appeared, on the face of the examinations, that the said examinations were taken by or before any justice of the peace having jurisdiction in and for the borough of Birmingham, inasmuch as it did not appear that the said C. R. Moorsom and T. Beilby, in the jurat of the said examinations named, were justices of the peace for the said borough,
2. That it appeared on the face of the examination of Anne Brown that she was a markswoman ; and that neither in the jurat nor attestation of the examination is it shown \*that her examination, as taken in writing, was read over to her, or that she knew the contents thereof. [\*416
3. That it did not appear on the face of the examinations that sufficient or any search or inquiry had been made to discover the settlement of T. Brown, the husband of the said Anne Brown ; nor that he had no settlement.
4. That it did not appear on the face of the examinations by any legal evidence that the said Anne Brown, before or at the time of the making of the said order, was chargeable to the parish of Birmingham.
5. That the said order was bad, so far as it regarded Henry, the son of the said Anne Brown, inasmuch as it purported to remove the said Henry as legitimate ; whereas it appeared on the face of the examination of the said Anne Brown that he was illegitimate.

In answer to the first and second last-mentioned objections, it was contended that the appellants were not entitled, under their grounds of appeal, to be heard on them. With regard to all the five last-mentioned objections, the respondents contended that the examinations and order were sufficient. The Recorder was of opinion that the appellants were entitled by their first ground of appeal to be heard on the first two last-mentioned objections taken by them to the said examinations ; but he overruled all the five last-mentioned objections, and granted a case, at the request of the appellants, upon all the points last aforesaid.

If this court should be of opinion that the order ought to have been quashed by the Recorder, either on the ground on which it was quashed, or upon any or either of the other objections so taken as aforesaid by the appellants, then the order of the Court of Quarter Sessions was to be confirmed : otherwise to be quashed, and the order of removal to be confirmed

\*417] \*Sir *F. Kelly*, Solicitor-General, and *Greaves*, in support of the order of Sessions.<sup>(a)</sup> First, the Recorder held rightly that the examinations did not properly state a hiring and service. And the general ground of appeal, if it were the only one affecting the examinations, would give sufficient notice to make this objection admissible: *Regina v. Middleton in Teesdale*, 10 A. & E. 688. *Regina v. Flockton*, 2 Q. B. 535, may be considered an authority to the same effect. The respondents may probably contend that the general ground is not good here, because followed by special ones; *Regina v. Staple Fitzpaine*, 2 Q. B. 488; but there, after a general objection “that the said examination is informal and wholly insufficient in law, and bad on the face of it,” specific objections were taken, arising also on the face of the examination. The question there was, whether the respondents might not reasonably understand the specific objections as expressing all that was intended by the general one. Parties could not have been so misled in *Regina v. Middleton in Teesdale*, and *Regina v. Flockton*; nor can they here. The objection affecting the settlement of Anne Brown arises under the first ground of appeal; and there is no other ground under which a question on that point could be raised. Whether or not the particular ground of appeal, or the examination referred to, gave sufficient information to be acted upon by the sessions, was a question to be decided by that court: *Regina v. Bridgewater*, 10 A. & E. 693; *Regina v. Kesteven*, 3 Q. B. 810; *Regina*  
\*418] \**v. Totley*, 7 Q. B. 596; *Regina v. Bakewell*, 7 Q. B. 601. If, however, this court will enter into the inquiry, the decision at sessions was right, and the examination of Anne Brown did not sufficiently show a settlement by hiring and service. (The judgment, p. 426, post, renders it unnecessary to report the argument on this point.) The next two objections were also admissible under the first ground of appeal. In the examinations of Anne Brown and of Bynner, the justices named in the jurat are in no manner identified with those mentioned in the heading. In each instance two justices may have taken the examination, and two others have sworn the examinant: *Regina v. Shipston upon Stour*, 6 Q. B. 119, shows that this defect is fatal. Again, Anne Brown is a markswoman; and it does not appear by the jurat that her affidavit was read over to her and that she apparently understood it. This is a usual form, and ought not to be omitted. [COLERIDGE, J. In this court we have a general rule for it, Easter, 31 G. 3, Peacock’s Rules, K. B., 166; but why are we to impose a rule of practice on justices of the peace?] It is a rule of right reason. If the deposition of an illiterate person ought to be read over to him, the performance of that act should appear by the jurat. [COLERIDGE, J. Every examination ought to be read over to the deponent, whether he can read or not.] The present objection is supported by the ruling of Lord DENMAN, C. J., in *Rex v. Chappel*, 1 M. & Rob

(a) The case was argued before Lord Denman, C. J., Patteson, and Coleridge, J.



395. [Lord DENMAN, C. J. That has been overruled.(a)] Another valid objection, disallowed by the Recorder, is that the order of justices removes all the infant paupers as the "children" of Anne Brown, 'whereas Henry, the eldest, appears by her examination to be illegitimate. "Child," *primà facie*, means a child born in wedlock; *Rex v. Wyke*, Bur. S. C. 264; *Regina v. Tolley*. [COLERIDGE, J. This affects the present order as to the one child only.] It is material in that point of view, if only as to the costs; but, further, the order, though erroneous, would have been conclusive as to this child, if not appealed against: *Rex v. Hinxworth*, Cald. 42; *Rex v. Towcester*, Cald. 497.(b) The removal of the child as illegitimate would have had no injurious effect, since a bastard follows the mother's settlement, by stat. 4 & 5 W. 4, c. 76, s. 71, until he attain the age of sixteen or acquire a settlement of his own. [\*419]

Lastly, it is a good objection, under the 8th, 9th, 10th, and 11th grounds of appeal, that the examinations do not show a sufficient inquiry into the settlement of Thomas Brown, the pauper's husband. It ought to have appeared that means had been used for ascertaining his settlement, and had failed. The wife's statement, that she cannot tell to what parish or place he belonged, is nothing more than her inference: had she been questioned on the subject, which does not appear to have been done, she might have stated facts tending to a legal conclusion of which she was not aware. *Regina v. Pilkington*, 5 Q. B. 662, shows how this might occur in a case of settlement by hiring and service. An analogous case is that of chargeability, where the conclusion is by inference of law from facts which the court ought to see; *Regina v. High \*Bickington*, [3 Q. B. 790, note (a). If parishes might remove to a wife's maiden settlement without showing what had been done to ascertain that of the husband, great facilities would be given to abuse and fraud. [\*420] *Mellor*, *contra*, being called upon by the court as to this point, cited *Rex v. Harberton*, 13 East, 311, and *Regina v. Yelvertoft*, 6 Q. B. 801.] In *Regina v. Leeds*, 5 Q. B. 916, where a removal to the maiden settlement was held good, the examinations showed a sufficient inquiry as to the settlement of the husband. The law, as stated by WILMOT, J., in *Rex v. St. Matthew, Bethnal Green*, Burr. S. C. 482, 485, is, "that the child's settlement follows that of its father, if the father's can be found; and that no recourse shall be had to the mother's settlement, till that of the father can be traced no further." In general, when a woman marries, her previous settlement "is gone," as PROBYN, J., lays down the rule in *Rex v. St. Giles's in the Fields*, Burr. S. C. 2. The husband is, presumptively, an Englishman: if he is a foreigner, or if, for any other reason, the wife's settlement is not destroyed at the marriage, the reason ought to be shown by those who rely upon her settlement. In *Rex v.*

(a) See 2 Russ. on Crimes, 885, (3d ed., by Greaves,) B. 6, c. 4, s. 2.

(b) See *ibid.*, p. 498, note (a), and p. 47; S. C. 2 Bott. 714, pl. 898, 6th ed.

*Ryton*, Cald. 39, where a removal to the maiden settlement was supported, the question arose, not on examinations, but on the finding of the sessions in a special case; and reasons appeared for concluding that the husband's settlement could not be ascertained. The same observations apply to *Rex v. Hensingham*, Cald. 206. *Rex v. Woodsford*, Cald. 236, which may be cited on the other side, is not an express adjudication on \*421] the point now raised: the question was, under a \*rule of quarter sessions that appellants should begin, what amount of proof on their part was sufficient to require an answer from the respondents. *Regina v. Yelvertoft*, was decided, as to this point, on the authority of *Rex v. Harberton*: but the latter decision turned in a great measure on the particular circumstances occurring in that case; there was no discussion of authorities; and the case has not usually been acted upon as a precedent. If, in the present instance, there had been some evidence of inquiry, the sessions would have been the proper judges of its sufficiency; but, the examinations showing none, this court will decide against the order of removal.

*Mellor*, and *I. Spooner*, contra. The rule established by *Regina v. Middleton in Teesdale*, 10 A. & E. 688; *Regina v. Staple Fitzpaine*, 2 Q. B. 488; and *Regina v. Flockton* 2 Q. B. 535, is, that, on a general ground of appeal for defect on the face of the examinations, appellants may go into specific objections of that class, though the grounds of appeal state also objections in substance; but that, if such general ground be followed by specific ones alleging defect on the face of the examinations, the appellants are restricted to those grounds, and cannot avail themselves of the more general one to introduce objections not specified. Here the first ground of appeal clearly did not point to any deficiency in the case of hiring and service presented by the examinations. [LORD DENMAN, C. J. It is an important rule, and one which should now be well understood, that, where the notice of grounds of appeal \*states a general \*422] objection to the examinations, and then specifies particular ones, the appellants shall not avail themselves of the general ground to go into a particular one not specified. For, if the particular objection had been pointed out, the respondents might, upon that, have withdrawn from supporting the order; but, by the omission to specify it, they are induced to proceed, not thinking that it will be relied upon. The general ground of appeal, here, does not refer to the settlement; nor indeed do any of the specific ones point to it; but the general ground speaks of the "examinations" as "bad and insufficient on the face thereof;" and objections on the face of the examinations are pointed out by the fifth and eighth grounds of appeal. Therefore you need not argue this point further.] This decision will dispense also with any argument as to the jurat of Anne Brown's examination, or the authority shown in the persons before whom the examiners were sworn. Then, as to the illegitimate child, Henry: that child must, by stat. 4 & 5 W. 4, c. 76, s. 71, "have and follow the settle-

ment of the mother" "until such child shall attain the age of sixteen, or shall acquire a settlement in its own right." The order, then, is correct at present, and cannot prejudice hereafter. If, after the child attained sixteen, a new state of things arose, rendering the nature of its present settlement material, the order of justices, compared with the examinations, would at any time make the case clear. An objection like this was overruled in *Regina v. Shipston upon Stour*, 13 Law J., M. C. (N. S.) 128.(a) [COLERIDGE, J. Would the examinations sent \*by the officers of Birmingham to those of Cheltenham be evidence between Chel- [\*423  
tenham and a third parish?] It may be inferred from *Regina v. Sow*, 4 Q. B. 93, that they would at least be evidence against Birmingham. But, even after the child attained sixteen, if the mother's settlement had not altered, the child's would still be in Cheltenham till it gained another settlement of its own: therefore the supposed inconvenience on which this objection proceeds is not likely to arise.

Lastly, as to the want of search for a settlement of the father. *Rex v. Harborton*, 13 East, 311, and *Rex v. Yelvertoft*, 6 Q. B. 801, are authorities clearly showing that respondents or appellants may rest their case upon a maternal settlement if the evidence raises no suggestion as to a settlement of the father. And, in *Regina v. St. Margaret, Westminster*, 7 Q. B. 569, 573, Lord DENMAN, C. J., said: "If one settlement only had been proved, that of the mother as alleged in the examinations, it might have been sufficient. But, when it appeared that there were two, and one of them, the father's, in a parish as to which no evidence was given, the sessions were entitled to say, 'you have shown that the father had a settlement, but have not ascertained the parish, therefore the case fails.' " The doctrine of these cases agrees with that \*of *Rex v. St. Mary, Beverley*, 1 B. & Ad. 201. It is true that, if parties [\*424  
may allege a mother's settlement without showing why the father's is not resorted to, frauds may be committed; but the same objection extends to other cases in which parties may rest on *prima facie* proof. [COLERIDGE, J. Does not a maternal settlement differ in some degree from an ordinary *prima facie* case of settlement? The presumption is that the husband, if an Englishman, was settled somewhere.] The proof of that settlement lies on the party interested in establishing it, if no evidence of it has come from the other side. The present case is stronger than *Regina v. Yelvertoft*; for the search, there, if necessary, would at least have been limited to London: here no limit could be assigned. In *Regina v. St. Margaret*,

(a) S. C., not reported on this point, 6 Q. B. 119. The order (after reciting a complaint that "Sarah Sutton, single woman, and her illegitimate child, William, aged about seven weeks," had come to inhabit, &c.) adjudged "the place of the legal settlement of the said Sarah Sutton and her said child" to be in the parish of Atherstone upon Stour, &c. It was made a ground of appeal, that the order adjudicated the child's settlement in A. upon S. absolutely, "whereas it should have adjudged and ordered that as an illegitimate child, he should have and follow the settlement of his mother the said S. S. until he should attain the age of sixteen, only." But the court dispensed with any argument on the respondents' part as to this objection, and decided against them on another.

settlement could not have been correctly made. But, if the husband's settlement cannot be made to appear, the place of the maiden settlement of the wife is, *prima facie*, that to which she must be taken: the question on the sufficiency of a search for the husband's settlement will not arise either at the sessions or in this court: the wife's being taken to continue till it is proved to have been displaced will cast the burden of proof on those who are interested in discovering that it has been displaced.

This duty belonged to the respondents in the first instance, and is transferred to the appellants after the removal.

Order of Sessions confirmed as to the pauper Henry; quashed as to the other paupers.

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\*429] **\*DOE on the demise of GEORGE BUTLER, and on the demise of JONATHAN HOWARD and THOMAS GEORGE HOWARD, against Lord KENSINGTON and MARYCHURCH.**

**DOE on the demise of GEORGE BUTLER, and on the demise of JONATHAN HOWARD and THOMAS GEORGE HOWARD, against Lord KENSINGTON, DAVID DANIEL the elder, and DAVID DANIEL the younger.**

Lands were conveyed to such uses as K. should appoint, and, in default of and until appointment, to K. and his assigns for K.'s life, and, from and after the determination of that estate in K.'s lifetime, to a trustee for K. and his assigns, and to bar dower; and, from and after K.'s decease, to K.'s heirs and assigns.

*Held*, that during K.'s life-estate, and before such appointment, K. was a party enabled to charge the fee-simple in possession with an annuity, within the meaning of stat. 53 G. 3, c. 141, s. 10, and therefore the annuity (being of the value required by that clause) did not need enrolment under sect. 2.

By an annuity deed, reciting conveyances in fee to K., the grantor, of certain premises, K. covenanted to B., the grantee, that, if the annuity should be in arrear 14 days, B. might enter on the premises and distrain; if 21 days, B. might enter and take the rents and profits until the arrear should be satisfied. It was then witnessed that, for further securing the annuity, K. with the consent and by the direction of B., appointed (under a power vested in K.) and demised, to H., (party to the annuity deed,) his executors, &c., for 99 years, the premises before mentioned, then in the occupation of K., which premises, it was agreed by the same clause, should, for the purposes of the deed, be considered as held and occupied by K. as tenant to H., at the yearly rent of 500*l.*, payable on the same days as the annuity. The demise for 99 years was on trust to permit K. to take the rents and profits till default in payment of the annuity; and, if the annuity should be in arrear 30 days, then, out of the rents and profits, or by demising, selling or mortgaging the premises for any part of the 99 years, to raise sufficient money for payment of the arrears, and apply the same accordingly, paying K., or permitting him to receive, the residue.

On default for 30 days in payment of the annuity, ejectment was brought, on the several demises of B. and H.: and a verdict was found for the plaintiff on B.'s demise, but for the defendants on that of H., (under the judge's direction,) because H. had not given K. notice to quit.

On motion for a new trial on the ground that the plaintiff could not recover on B.'s demise by reason of the term in H. and the tenancy of K.: *Held*, that the verdict on that demise was rightly found: for that the first clause of entry entitled B. to maintain ejectment after 21 days' default, and that right was not taken away by the creation of a term in H. in the manner and for the purposes stated.

*Seemle*, that, if H. had mortgaged the premises for payment of the annuity, B. could not have brought ejectment while the mortgage subsisted.

THE first of these actions was an ejectment for houses and land in Pembrokeshire. On the trial, before ROLFE, B., at the Haverfordwest Summer assizes, \*1844, it appeared that the ejectment was brought on a clause of entry in an annuity deed, the material parts of which were as follows. [\*430]

By indenture of 24th February, 1814, between William Lord Kensington of the first part, Robert Butler of the second part, Edward Howard, stated to be a trustee appointed by and on the behalf of R. Butler for the purpose after mentioned, of the third part, and James Gibbs of the fourth part: After reciting indentures of lease and release dated in March, 1800, by which messuages in the town of Haverfordwest were conveyed to the use of Lord Kensington in fee; and other indentures of August, 1811, and November, 1812, by which indentures respectively lands in the parish of Marives, Pembrokeshire, were conveyed to the use of Lord K., his heirs, &c., during his life, without impeachment of waste, and, after the determination of that estate in his lifetime, to the use of E. Foulkes, his executors, &c., during Lord K.'s life, in trust for him and his assigns, and from and after the determination of that estate, to the use of Lord K. in fee: And further reciting that, by indentures dated January 11th and 12th, 1813, certain messuages, tenements, &c., in the parish of Laugharne, Carmarthenshire, were conveyed, limited and assured to such uses, and upon and for such trusts, &c., and under and subject to such powers, provisoes, and declarations, as Lord K., by any deed, &c., should limit, direct or appoint, and, in default of such limitation, &c., and so far as such limitation, &c., should not extend, and until such limitation, &c., should be made, to the use of Lord K. and his assigns for and during the term of his natural life without impeachment of waste; and, from and after the determination of that estate by \*forfeiture or otherwise in the lifetime of Lord K., to the use of C. S., his heirs and assigns, during the natural life of Lord K., in trust for Lord K. and his assigns, and to prevent any wife of Lord K. from being entitled to dower in or out of the said premises; and from and after the decease of Lord K. to the use of his heirs and assigns for ever: And further reciting that the said R. Butler had agreed with Lord Kensington to purchase of him an annuity of 240*l.*, payable to R. Butler, his executors, &c., during certain lives, for the sum of 2400*l.*, and it had been thereupon agreed that such annuity should be secured by the warrant of attorney of Lord K., and also by such powers and remedies by distress and entry upon, and perception of the rents and profits of, the hereditaments in this indenture (of 1814) before mentioned and after particularly described, and likewise by a grant and demise to be made of the same hereditaments to the said E. Howard for such term of years and upon such trusts as were after declared; and that, by way of further security, the said J. Gibbs should be appointed receiver as after mentioned; and that Lord K. should enter into the covenants and agreements in this indenture contained. And after [\*431]



reciting payment by R. Butler of the 2400*l.* to Lord K., and execution by Lord K. of the warrant of attorney: It was witnessed: That, in pursuance of the said agreement, and for and in consideration of the sum of 2400*l.*, &c., Lord K. granted the annuity of 240*l.* to R. Butler, his executors, &c., for the lives before mentioned. Covenant by Lord K., for himself, his heirs, executors, &c., to and with R. Butler, his executors, administrators and assigns, that, in case the annuity or any part thereof

\*432] shall be behind and unpaid by the space of \*fourteen days after any of the days of payment, it shall and may be lawful to and for the said R. Butler, his executors, &c., into and upon the manor, capital and other messuages or tenements, farms, lands, hereditaments and premises hereby charged with the payment of the said annuity, or expressed or intended so to be, and every of them, and every part thereof, to enter, and distrain for the same annuity and all arrears thereof, and the distress and distresses then and there found to lead, drive and carry away and impound, and the same in pound to detain and keep until the said annuity and all costs, &c., shall be fully paid and satisfied; and, in default of payment in due time after such distress made, to appraise, sell, &c., (as in case of distress for rent.) Further covenant by Lord K., for himself, his heirs, &c., to R. Butler, his executors, &c., that, if the annuity, or any part, &c., shall be behind, &c., twenty-one days after any of the days, &c., it shall and may be lawful to and for the said R. Butler, his executors, &c., and the said W. Lord K. doth hereby direct and appoint, give and grant, to him and them full power and authority into and upon the said manor, capital and other messuages, &c., hereinafter particularly mentioned and described, and intended to be hereby granted and demised, or into or upon any of them or any part thereof in the name of the whole, “to enter, and the same to have, hold and enjoy, and the rents, issues and profits thereof, and of every part thereof, to receive and take to his and their own use and benefit, until he or they shall be thereby or therewith, or otherwise, fully paid and satisfied all arrears of the said annuity,” and also so much of the same as shall accrue, &c., during such time as

\*433] the said R. Butler, his executors, &c., \*shall continue in possession after such entry or entries, together with all such loss, costs, &c., as shall be occasioned by the non-payment. Then followed a covenant by Lord K. for payment of the annuity.

And it was also witnessed that, “for the further, better and more effectually securing the payment of the said annuity,” and in consideration of 10*s.* &c., “he, the said W. Lord K., with the consent and approbation, and by the direction and appointment, of the said R. Butler, testified by his being a party to and sealing and delivering these presents, hath, as well in pursuance and exercise of his aforesaid power and authority(a) as in respect of his estate and interest in the premises, directed, limited and appointed, and also granted, bargained, sold and demised, and by these

(a) In the deed conveying the Carmarthenshire property, p. 430, *antè*.



presents doth direct, &c., and also grant, &c., unto the said E. Howard, his executors, administrators and assigns, all that manor," &c., of Upper Castle Toth, with all and singular the rights, members, &c., thereunto belonging, and also all that capital messuage, tenement and lands, &c., commonly called by the name of Upper Castle Toth, formerly in the tenure or occupation of, &c., and now of the said W. Lord K., his under-tenants or assigns; and also all that other messuage, &c.: all which said manor, &c., capital messuage, &c., are situate, &c., in the parish of Laugharne, in the county of Carmarthen, and are the same, &c., (identifying them with the premises mentioned in the deed of 1813,) and also all those two messuages, &c., situate in the Short Row, &c., (describing premises in Haverfordwest, and in the parish of Marlves, and identifying them with those mentioned in the recited indentures of 1800, 1811, and \*1812,) and also all that capital mansion or dwelling-house, with the stable, garden, &c., thereunto belonging, situate, &c., in the several parishes of St. Mary and St. Martin, in the said town and county of Haverfordwest, now or late in the possession of , and formerly in the tenure or occupation of Hugh Fowler, &c. And also all that piece or parcel of ground, &c., (describing other lands and premises in Pembrokeshire,) "all which said premises, so intended to be hereby appointed and demised, are now in the several tenures or occupations of the said W. Lord K., and of David Dimock," &c., (naming other parties,) "as the tenants of him the said W. Lord K., at and under the several yearly rents of 6*l.* 6*s.*," &c.: "and which said premises in the occupation of him the said W. Lord K., shall, for the purposes of these presents, be deemed and considered to be held and occupied as the tenant thereof to the said E. Howard, at and under the yearly rent of 500*l.*, payable quarterly at or on the same several days or times whereon the said annuity or yearly sum of 240*l.* is hereinbefore appointed to be paid as aforesaid:" together with all and singular outhouses, &c., and appurtenances, &c., and all the estate, &c., of him the said W. Lord K. of, in, to, &c., the said manor, capital and other messuages, or tenements, lands, &c., hereby granted and demised, &c.: habendum to the said E. Howard, his executors, &c., from thenceforth for and during and unto the full end and term of ninety-nine years without impeachment of waste; but nevertheless upon the following trusts, viz.: to permit and suffer the said W. Lord K., his heirs, appointees and assigns, to receive and take the yearly and other rents, issues and profits of \*the said capital and other messuages, &c., to his and their own proper use and benefit, until default shall happen to be made of, or in payment of, the said annuity or some part thereof, at or on the days or times and in manner hereinbefore limited, &c.: and upon further trust that, in case the said annuity shall be behind and unpaid by the space of thirty days after any of the days of payment, being lawfully demanded, &c., then and so often the said E. Howard, his executors, &c., shall, from time to time, by and out of the

rents, issues and profits of all and singular the said manor, capital and other messuages, &c., hereby demised or expressed or intended so to be, or by demising, selling, leasing or mortgaging the same, or any part thereof, for and during all or any part of the said term of ninety-nine years, or by such other ways or means as to him the said E. Howard, his executors, &c., shall seem meet, raise and levy such sum and sums of money as will be sufficient to pay and satisfy the said annuity, or so much thereof as shall from time to time happen to be in arrear and unpaid, and also such sum, &c., loss, cost, &c., as Butler and Howard respectively, their respective executors, &c., shall pay, sustain, &c., by reason of the nonpayment, &c., or the performance of the trusts, &c., or the taking possession, &c.; and shall and do pay and apply the moneys, so to be raised or levied, in or towards the payment and satisfaction thereof accordingly, and shall and do pay, or otherwise permit and suffer the said W. Lord K., his heirs, appointees and assigns, from time to time to receive and take, the residue or surplus of the rents, issues and profits of the said hereby demised premises, after full payment and satisfaction of the said annuity \*436] and all \*arrears, &c., and all such costs, &c., to and for his and their own use and benefit. Proviso, that, on the expiration of the lives, and full payment of the annuity, and all arrears, &c., "the said term of ninety-nine years of and in the said premises, or expressed and intended to be hereby granted and demised, or so much and such part or parts thereof as shall then remain unsold and undisposed of for the purposes aforesaid, shall cease, determine and be void to all intents and purposes, save and except any mortgage or mortgages which shall have been made for answering these purposes."

Then followed a covenant by Lord K. to R. Butler and E. Howard, that Lord K. "is and stands lawfully, rightfully and absolutely seised of and in the said manor, capital and other messuages," &c., "hereinbefore by these presents granted and demised as aforesaid," with the appurtenances, "of a good, sure, perfect and indefeasible estate of inheritance in fee-simple in possession, with such power of appointment as aforesaid," without any manner of condition, &c., and that he now hath in himself good right, &c., to limit and appoint, grant, demise and assure, &c., to E. Howard upon the trusts and in manner and form aforesaid. And that the said manor, capital and other messuages, &c., shall and lawfully may, at all times during the lives, &c., "remain, continue, and be subject and liable to the several powers, remedies, trusts and authorities herein and hereby limited and appointed, granted and contained or expressed, of and concerning the same premises, and be accordingly peaceably and quietly held and enjoyed," and the rents, &c., received and taken without any \*437] lawful let, suit, &c., of or by the said W. Lord K., his heirs, \*&c. And that Lord K., his heirs, &c., shall and will, from time to time, "upon the reasonable request of the said R. Butler, his executors," &c., make, do and execute, or cause to be made, &c., all and every such

further and other lawful and reasonable act and acts," &c., and deeds, conveyances, &c., "for the better and more effectually charging and subjecting the same premises with and to the payment of the said annuity and such powers and remedies as aforesaid, and also for appointing, granting and demising the same premises with the appurtenances unto the said E. Howard, his executors," &c., for the then residue of the said term, upon the trusts and in the manner aforesaid, as by the said R. Butler, his executors, &c., shall be reasonably required.

Then followed stipulations as to the operation and enforcement of the warrant of attorney, and the redemption, if desired, of the annuity. And it was witnessed that, for further securing payment of the annuity, "the said W. Lord K., at the nomination, instance, and request of the said R. Butler, and also the said E. Howard, have, and each of them hath, nominated," &c., and do, &c., nominate, &c., the said James Gibbs to be "their and each of their receiver and attorney," to ask, demand, &c., and receive of and from the present or future tenants or occupiers of the said manor, capital, and other messuages, &c., hereinbefore charged and demised as aforesaid, or other the person or persons liable, "all and singular the rents, issues, and profits, which shall from time to time grow, incur, or become due for or in respect of the said manor, capital, and other messuages," &c., "for and during such time as the said annuity," &c., "shall remain charged and chargeable thereon," and to distrain and bring actions, give receipts, releases, \*acquittances, &c.; such [\*438 rents and profits to be received by Gibbs upon trust, after deducting a certain amount for his trouble, to pay the residue to E. Howard, his executors, &c., to be applied upon the trusts and for the purposes before declared concerning the term of ninety-nine years.

The first ejectment was brought to recover the above-mentioned premises in Haverfordwest, on default in payment of the annuity. The lessor of the plaintiff, George Butler, was surviving executor of Robert Butler. The lessors Jonathan Howard and Thomas George Howard were the executors of Edward Howard. Lord Kensington had, in 1836, sold part of the premises now in question to the defendant Marychurch, who at the time had notice of the annuity. He built on the land, but did not pay the purchase-money or take a conveyance. There were admissions in the cause, identifying the premises now claimed with those in Lord Kensington's occupation at the date of the annuity deed.(a) The deed was not enrolled pursuant to stat. 53 G. 3, c. 141, s. 2. Evidence was given to show that the premises were of the value mentioned in the exempting clause, sect. 10.(b)

(a) On the argument, some discussion arose as to the extent and effect of the admissions, but the result does not materially affect the above statement.

(b) Stat. 53 G. 3, c. 141, s. 10, enacts, "That this act shall not extend" "to any annuity or rent-charge secured upon freehold or copyhold or customary lands" "of equal or greater annual value than the said annuity, over and above any other annuity, and the interest of any principal sum charged or secured thereon, of which the grantee had notice at the time

It was objected, as to the second demise in the declaration, that, if the clause of appointment to E. Howard had the effect of making Lord Kensington tenant from year to year under Howard, a notice to quit was  
 \*439] necessary before ejectment could be brought, and none had been proved. Other objections were taken, which ROLFE, B., overruled, not reserving any point for the court: and, at the close of the plaintiff's case, he observed that there was no question for the jury, and directed a verdict for the plaintiff on Butler's demise, and for the defendants on that of the Howards.

*E. V. Williams*, in Michaelmas term, 1844, obtained a rule nisi for a new trial, on the grounds (taken at nisi prius) that the annuity deed had not been enrolled; and that the demise by Butler could not be supported, because, by the clause of appointment to E. Howard, there was an outstanding term in him, and therefore he was the only party entitled to bring ejectment, but a verdict had been given for the defendants on his demise. *Williams* contended that the objection from the term outstanding in E. Howard was the more conclusive against G. Butler, as R. Butler had himself consented to its creation. In Michaelmas vacation, 1845, (a)

*Chilton* and *Wilson* showed cause. First, as to the enrolment. It appeared in evidence that there were freehold lands comprised in the deed, of sufficient value to bring it within stat. 53 G. 3, c. 141, s. 10, if the grantor was enabled to charge the fee-simple in possession. And Lord Kensington was so enabled. On comparing sect. 8 of the annuity act, 17 G. 3, c. 26, with the corresponding clause, sect. 10, of stat. 53 G. 3, c. 141, it appears that the latter contains words which were not in the  
 \*440] former, namely, "or the fee-simple \*whereof in possession the grantor is enabled to charge at the time of the grant." Those words much enlarge the exception. If the grantor had power over the equitable fee alone, the case would fall within the exception, even under the more limited language of the earlier act; *Shrapnel v. Vernon*, 2 Br. Ch. Ca. 268. A power of appointment was also held sufficient under the earlier act, in *Halsey v. Hales*, 7 T. R. 194. Here the grantor has the absolute fee of the premises in Haverfordwest; and, as to the other premises, he has the legal estate for life, and the legal remainder in fee; all that is interposed is the legal estate of the trustees, which is to take effect only if the estate for life determine in the grantor's lifetime. He surely has a larger power over the whole fee than a person who has only an equity of redemption.

Secondly, it has been contended that the term granted to E. Howard took away any right which G. Butler, as R. Butler's executor, might have had to bring ejectment under the prior grant to R. Butler of a right to enter on default in payment of the annuity. But the intention of the deed

of the grant, whereof the grantor is seised in fee-simple or fee-tail in possession, or the fee simple whereof in possession the grantor is enabled to charge at the time of the grant."

(a) December 5th. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Ja.

is to charge the whole property for the benefit of R. Butler. If the annuity is in arrear fourteen days, he is empowered to enter and distrain; if for twenty-one days, the deed gives him authority to enter upon the premises therein described, and intended to be thereby granted and demised, and to have, hold, and enjoy the same and receive the rents and profits, until he shall be fully paid. This is an indefeasible right: a clause inserted after such a grant, and merely ancillary to its purposes, cannot derogate from it. Effect must be given to every part of the deed, if possible; and on that principle the \*appointment to E. Howard must be taken to operate in furtherance of the security given to R. Butler, not in diminution of it, which would be the case if the appointment defeated his right of entry. [COLERIDGE, J. R. Butler consents to a term being created in another person. If this did not diminish his own previous right, it would seem that his consent was not needed.] It cannot have been meant as a waiver of his right of entry. The deed contemplates two sets of remedies for securing the annuity. First, Butler had a right to distrain or to enter and hold quousque upon the accruing of an arrear; and that gave him a right to maintain ejectment; *Jemott v. Cowley*, 1 Saund. 112 a.(a) And, secondly, by way of cumulative remedy, E. Howard had an interest conveyed to him. The distress, or entry quousque, it was probably thought, would not be a convenient remedy where the arrear was large; and therefore E. Howard had the power to treat the grantor of the annuity as his tenant. It is perhaps doubtful what the exact interest of the grantor was under this part of the deed: it is not declared that he is to be tenant from year to year, nor even that he is to be tenant to E. Howard, *his executors and assigns*. But he was made tenant "for the purposes of these presents;" and the appointment to E. Howard is made "for the further, better, and more effectually securing the payment of the said annuity." To nullify Butler's power of entry was clearly not one of the "purposes." The rent is to be considered payable by the grantor of the annuity on the same days as the annuity. Then the term is to be held by E. Howard in trust for the grantor, till default; but, upon default after thirty days, E. Howard may dispose of the term to satisfy the arrear. The \*grantor's tenancy, if it be a tenancy from year to year, could be determined only by a six months' notice ending on some 23d of February after the execution of the deed; so that the remedy on the clauses of distress and re-entry would, on the defendants' construction, be neutralized, instead of aided, in the case of arrears, for at least six months, and possibly for much longer. This cannot have been intended. But, at any rate, the whole deed must be looked at. The fourth rule for the construction of deeds, in Sheppard's Touchstone, 87, is, "that the construction be made upon the entire deed, and that one part of it doth help to expound another, and that every word (if it may be) may take effect and none be rejected, and that all the parts

(a) See *Doe dem. Biass v. Horsley*, 1 A. & E. 766.



do agree together and there be no discordance therein." Whatever E. Howard's interest was, it was subject to Butler's right of entry. [COLERIDGE, J. It is difficult to make both the interests stand. If Butler entered, could E. Howard make any use of the term?] E. Howard's interest might be then considered in the nature of a remainder awaiting the determination of Butler's interest. The tenancy of the grantor for year to year, if there be such a tenancy, could operate only to bar an ejectment brought by E. Howard, not one brought by Butler.

*E. V. Williams and Benson, contra.* The term of years vested in E. Howard prevents Butler from maintaining the ejectment. If that is not so as to the whole property in the deed, it is so, at any rate, as to the property, now in question, of which the grantor was to be tenant under Howard till the tenancy should be put an end to. First, however, as to the whole property; it is true that the early part of the deed would, if \*443] standing alone, enable \*Butler to maintain ejectment; but he has no legal estate while the term subsists in E. Howard: this term is created by Butler's consent: and the rent is reserved for his benefit: and, therefore, construing the whole deed together, E. Howard's term cannot be subject to Butler's power of entry. The case resembles that of a lease granted by a mortgagor in possession with the concurrence of the mortgagee. E. Howard has a power to mortgage: Could Butler enter on the mortgagee? And, if he could not, how can it be said that the power of entry overrides the term? It may be that two remedies were contemplated; and, upon the construction for which the defendants contend, there will be two: for if the term were forfeited, as by a breach of trust on the part of Howard, the power of entry would take effect: so that the only question is as to the order in which the two remedies are to rank. Suppose Howard, after the annuity or rent had been in arrear for ten days, were to distrain on his tenant, the grantor: he could not sell the distress for five days: now, before the fifteen days were out, the fourteen days mentioned in the early part of the deed would expire: could Butler then distrain, after a distress by his trustee? Then, next, as to the property, now in question, which was in the grantor's occupation at the date of the deed, he holds as tenant, upon any construction of the deed; and, as his rent is payable yearly, he is tenant from year to year, and cannot be turned out without six months' notice.

As to the enrolment, the question is merely whether, when no one has the actual fee-simple, it can be said that the tenant for life, being also, after the expiration of an intermediate estate, remainder-man, has power \*444] to \*charge the fee-simple in possession. This he has not, unless the language of the statute be strained to favour the grantee.

*Cur. adv. vult.*

The second ejectment was tried before COLTMAN, J., at the Carmarthen Summer assizes, 1845. It appeared that the defendants Daniel the elder and younger held part of the premises by lease for lives, granted to them



in 1806 by Herbert Lloyd, who conveyed the Carmarthenshire property to Lord Kensington in 1813. The other material facts were the same with those of the former case. The objections there taken were renewed. The learned judge directed a verdict for the plaintiff on G. Butler's demise, except as to the lands held by the Daniels under the lease of 1806, as above mentioned; and, as to these lands, and on the demise (as to the whole) by J. Howard and T. G. Howard, for the defendants.

*E. V. Williams*, in Michaelmas term, 1845, obtained a rule nisi for a new trial: and it was ordered that this case should come on for argument with the former motion in *Doe v. Lord Kensington*, then standing in the new trial paper. In Michaelmas vacation, 1845,<sup>(a)</sup>

*Chilton* and *Wilson* showed cause. The arguments in the former case apply to this. The appointment to Howard is not, in terms, inconsistent with the prior grant to Butler. It is "for the further, better and more effectually securing the payment of the said \*annuity," and therefore subject to the provisos and agreements already inserted in the deed for that purpose. Nor is there any real inconsistency. The deed contains a covenant for the entry of R. Butler, but not immediately, nor till the annuity has been in arrear for a certain time, and then only to hold until the arrears and costs are paid. That does not confer any estate. The legal estate vests in the termor, subject to the right of entry by the annuitant when the payments are in arrear: and *Jemott v. Cowley*, 1 Saund. 112 a, shows that a party invested with such a right for his indemnity may make a fictitious lease for the purpose of an ejectment. There are many instances of the same kind, where a party has the right to enter without having an estate. A further proof that the appointment to Howard does not interfere with the remedies before granted to Butler is found in the clauses following the appointment, by one of which Lord Kensington covenants to Butler and Howard for title in himself, with power of appointment, and that the premises shall remain subject "to the several powers, remedies, trusts and authorities herein and hereby limited and appointed, granted and contained or expressed, of and concerning the same premises;" and that Lord Kensington, at the request of Butler, will do all reasonable acts for better "charging and subjecting the same premises with and to the payment of the said annuity, and such powers and remedies as aforesaid, and also for appointing, granting and demising the same premises with the appurtenances unto the said E. Howard, his executors," &c., for the then residue of the said term, upon the trusts and in the manner aforesaid, as by the said \*R. Butler, his executors, &c., shall be reasonably required. The "powers, remedies," &c. must be taken (*reddendo singula singulis*) to be those contained in the original grant, and in the appointment to Howard, respectively. As to the question, whether the annuitant might enter upon

(a) December 11th. Before Lord Denman, C. J., Patteson, and Coleridge, Js. Williams, J., was at the Winter assizes on the Northern circuit.

a person to whom the appointee had mortgaged, the answer is, that the annuitant is party to the trust, and his proceedings would be governed by it; and that the deed in terms only empowers him to enter and hold till satisfaction of the arrears and costs. He might do what was authorized by that power, but not more.

*E. V. Williams, contra.* The arguments for the defendants in the former case apply to this, and have not been answered. Butler concurred in the demise to Howard; and his representative cannot raise objections which, practically, affect its validity. If the argument on the other side is valid, Howard might, by mortgage of the term, raise money enough to pay arrears; and yet, if the arrears had not been paid over to Butler, he, as the annuitant, might enter and dispossess the mortgagee. And so, as to the premises referred to by the deed as being in Lord Kensington's occupation, the appointee might distrain on the very day when the rent became due; and, after the lapse of fourteen days, the annuitant might enter, alleging that he had not been paid. Such terms cannot have been contemplated in executing the deed. *Cur. adv. vult.*

Lord DENMAN, C. J., in this term, (January 22d,) delivered the judgment of the court.

\*447] \*These were rules in two actions between the same parties: one in respect of lands in the town and county of Haverfordwest; the other of lands in the county of Carmarthen. The lessors of the plaintiff claimed in different ways under an annuity deed. Three objections were made to their recovering, applicable as we shall state hereafter in considering them.

The first applied to the whole deed, and so to both actions. It was objected that there had been no enrolment under stat. 53 G. 3, c. 141; and it was contended that enrolment was unnecessary, the case falling within the tenth section of the act. The lands on which the annuity was secured were freehold, and of greater annual value than the annuity, beyond any other annuity or the interest of any other principal sum charged thereon; and it was urged for the lessors that Lord Kensington, at the time of the grant, was either seised in fee, or at least enabled to charge the fee-simple in possession; and, if this be so, it cannot be contended that enrolment is necessary. On reference to the deed, it appears that the property in Haverfordwest had been conveyed to the use of Lord Kensington in fee: respecting this, therefore, there could be no question. The property in Carmarthen was conveyed to such uses as he should appoint by deed or will; and, in default of or until such appointment, to the use of himself for life; remainder to a trustee for his life, in trust for himself and to bar dower; remainder to his heir and assigns. The tenth section of stat. 53 G. 3, c. 141, corresponds to the eighth section of stat. 17 G. 3, c. 26, containing the same grounds of exception and more: it

\*448] is to be construed in the same spirit; and what that spirit ought to be is laid down by Lord KENYON in *\*Halsey v. Hales*, 7 T.

R. 194. Within the rule there laid down, we are of opinion that Lord Kensington had power to charge the fee in possession, and that this objection failed.

The second objection applied to the demise by Howard, and to some part of the premises in Haverfordwest, and to all in Carmarthen. These appear at the date of the deed to have been in the occupation of Lord Kensington: and by that deed it is provided that they are to be considered as held and occupied by him as tenant to Howard, at a rent of 500*l.*; upon which the objection arises, that no notice to quit had been given: and, as no answer was given to this, it must prevail to the extent to which it applies (a)

The third objection applies to all the property, and to the demise by Butler, on the ground that the deed discloses an outstanding term in Howard. The deed, in the early part, grants to Butler, first, a right to enter and distrain for the annuity, if it be in arrear for fourteen days after any day of quarterly payment; and, if it shall be in arrear twenty-one days, it further grants a power to enter and hold possession until all arrears be paid up. It is admitted that, if the deed ended here, there is such default in payment of the annuity that the demise by Butler would be well supported. But it goes on: and, "for the further, better and more effectually securing the payment of the said annuity," Lord Kensington, "with the consent and approbation, and by the direction and appointment of" Butler, grants and demises the premises charged to Howard for the term of "ninety-nine years: the trusts of the term are to permit Lord Kensington to receive the profits until [\*449] default in payment of the annuity for thirty days; and, upon such default after demand, out of the rents, or by demising, selling, leasing or mortgaging the same, or any part thereof, for all or any part of the term, to raise and pay off the arrears with all expenses; Lord Kensington still to receive the surplus rents; and, upon death of the *cestui que vies*, and full satisfaction of the annuity, the term to become void, save as to any mortgages made under the power for answering the purposes of the term. This term is relied on as an answer to the demise by Butler; and, in order to give the objection its full force, the fact before mentioned is to be remembered, that of all the demised premises of which Lord Kensington was in the occupation at the date of the deed, he was, for the purposes of the deed, to be considered to be the occupier as tenant to Howard at a rent of 500*l.*, payable on the same days as the annuity of 240*l.*

The principles on which the question here raised is to be decided are clear; that, in a court of law, and in the action of ejectment, the legal title to the possession, if it conflict with the equitable, must prevail: we cannot prevent a subsisting term from being set up, even by the trustee

(a) On the point here noticed incidentally by the court, no attempt was made to set aside the verdict for the defendants.

against the *cestui que trust*. Whatever, therefore, the purposes for which Howard's term was created, if, upon the true construction of the deed, he is legally entitled to the possession, so as to override the right of entry in Butler, Butler's lessee cannot recover. Nor would there be any hardship in this. Howard's term would even more effectually have protected Butler's interests, and virtually secured him the possession of the land, but \*450] for the laches of which \*Howard has been guilty in not giving the notice to quit. Still it is a question of construction; and we must look at the whole deed, and from all parts collect the intentions of the parties expressed or implied. The facts are these. Lord Kensington, in possession, creates a charge on the land in favour of Butler, and gives him two powers of entry: then, by Butler's direction, and in order further to secure to him the payment of the annuity in respect of which the charge was created and the entry given, he grants the term to Howard. Butler then consents to the creation of the term. Howard has notice of the right of entry: it is clear that, if the term had been created without Butler's consent, it could not defeat his right of entry, who was a prior encumbrancer: will his consent avail to give it that operation? We think, under the circumstances, and looking at the whole deed, that it will not, and that this termor, taking with notice, even if his interest had been adverse to Butler's, would have taken the lease subject to the right of entry: but the purposes of the term are to be taken into account; and the whole deed is to be made consistent with itself, if possible. This construction will make it so. The right of entry does not destroy the term: Butler, under it, will enter and take the profits until the arrears of the annuity are satisfied: the termor, or (no notice to quit having been given) Lord Kensington, will then reoccupy and receive the profits as before; *Doe dem. Chawner v. Boulter*, 6 A. & E. 675; and this will effectuate all the purposes of the deed without doing violence to any legal principle.

\*451] We purposely limit our conclusion to the present \*circumstances. Adverting to the argument for the defendants, that Howard might have assigned or mortgaged the term in order to raise the arrears of the annuity: if the term had been so applied, we are by no means prepared to say that the right of entry would have prevailed against it; and it would not be inconsistent with our present conclusion to hold that it could not. It may well be that, by the intention of the parties, the right of entry was to be paramount to the term in one state of things, and not in the other; in other words, that the term was to be subject to the right of entry under one state of things, and not under another. No doubt the parties, by express words, might have made it so: and we think, by implication, they have in fact so provided with equal clearness.

Our judgment, therefore, will be for the lessor of the plaintiff, and the rules be discharged. Rules discharged.

\*The QUEEN against NEVILL, Clerk. *Wednesday, January 21st.* [\*452]

A local act enabled trustees for re-building a parish church, to borrow money, and charge it on rates, to which the trustees should "assess all and every person and persons who do or shall inhabit, hold, or occupy any land, house, shop, warehouse, vault, mill, or other tenement within the said parish:" half the rate to be paid by the owner or landlord, and half by the occupier or tenant: tenants or occupiers to pay the whole in the first instance, and deduct the half out of the rent: power of distress was given, if any person should omit to pay for thirty days after personal demand or written demand left at his place of abode; power of imprisonment if he secreted his goods: power of distress if any person assessed should quit his land, dwelling-house, warehouse, shop, vault, mill, or other tenement, in respect whereof he should be so rated as aforesaid, before paying his said rate; and it was enacted that any person appointed by the trustees might inspect the books of the poor-rate and land-tax, to ascertain the rates to be levied under this act.

*Held*, that the vicar was not ratable in respect of his tithes as an "other tenement."

On appeal by the Rev. Christopher Nevill, clerk, vicar of East Grinstead, Sussex, against a rate made by the trustees appointed under stat. 20 G. 3, c. 79, (a) for the purposes therein mentioned, the Sessions confirmed the rate, subject to the opinion of this court upon a case substantially as follows.

The above-mentioned act, after reciting that the steeple of the parish church of East Grinstead had, by "falling upon the body of the said church, entirely demolished the same," (b) enacted (c) that it should be lawful for the trustees thereafter named to cause the said church to be rebuilt, and also, in order to defray the expense of rebuilding the said church, that (d) it should be lawful for the said trustees, from time to time, either to grant annuities or to borrow money at interest, which said annuities so purchased, or money so lent and advanced, should be charged and chargeable on the rates or assessments to be levied or raised (e) for the purpose of rebuilding the church; provided that all the \*mo- [\*453] neys so to be borrowed and raised should not exceed the sum of 4000*l.*

An act passed, &c., (51 G. 3, c. i., local and personal, public,) intituled "An act for enlarging the powers of an act of his present majesty for rebuilding the parish church of East Grinstead, in the county of Sussex," after reciting that the sum of 4000*l.*, authorized by the said first mentioned act to be borrowed for the purpose of building the said church, was insufficient for such purpose, enacted (c) that it should be lawful for the trustees by the said first-mentioned act appointed to raise the further sum of 4000*l.* upon the credit of the said rates or assessments by the said recited act authorized to be made and assessed.

The clause (e) in the first-mentioned act, empowering the trustees to make rates, is as follows. "That it shall and may be lawful to and for the said trustees, or any five or more of them, and they are hereby directed or required twice or oftener in every year, by any writing under their

(a) "An act for rebuilding the parish church of East Grinstead, in the county of Sussex."

(b) In the year 1785.

(c) Sect. 1.

(d) Sect. 16.

(e) See sect. 8, p. 453, post.

hands and seals, to assess all and every person and persons who do or shall inhabit, hold, or occupy *any land, house, shop, warehouse, vault, mill, or other tenement* within the said parish, in any sum of money not exceeding 1s. in the pound in any one year, of the yearly rent of such lands, houses, shops, warehouses, vaults, mills, or other tenements; and that the moneys so to be raised as aforesaid, and otherwise in pursuance of this act, shall be paid to such person as shall be appointed by the said trustees, or any five or more of them, to receive the same, and shall be applied for the purposes of this act.

\*454] By a subsequent clause (a) provision is made for \*appeal to the Quarter Sessions by any person or persons who “shall find himself, herself, or themselves aggrieved by any rate or assessment to be made by virtue of this act, or any other matter or thing to be done in pursuance thereof.”

The trustees appointed by the authority of the said first-mentioned act, on 21st October, 1844, made and published a rate as follows.

“Parish of East Grinstead, in the county of Sussex, to wit. A rate or assessment of 6d. in the pound upon every inhabitant and occupier of lands, houses, tithes, shops, warehouses, vaults, mills or tenements within the parish of East Grinstead, in the county of Sussex, and for the purposes mentioned in an act of parliament,” &c., specifying the above-mentioned acts.

The appellant was rated as follows :

Persons rated.	Premises assessed.	On Lands and Tenements.	Church Rate at 6d. in the Pound.
Rev. C. Nevill.	Small tithe.	£288 0 0	£7 4 0

In the grounds of appeal the appellant alleged : 1. That the said rate was, on the face of it, bad, illegal and unwarranted by any law or statute. 2. That the said rate was bad and illegal on the face of it, as purporting to include and rate and assess tithes, which are not ratable for the purposes of the said rate. 3. That the property in respect of which he, the appellant, was so rated was not legally ratable for the purposes of the said rate. And, lastly, that the appellant was not legally liable to be rated for the small tithes in and by the said rate, or by virtue of the said act for rebuilding the said parish church.

On the hearing of the appeal, it was admitted that the said church was rebuilt, and that the ordinary \*churchwardens' rates for repairing  
\*455] the said church were levied in the said parish, as well as rates made under the powers of the above-mentioned acts for defraying the expenses of rebuilding the said church. On the part of the respondents it was argued that the appellant was properly rated under the said acts of parliament, inasmuch as the words “other tenement,” in the above recited clause of the said first-mentioned act, (sect. 8 of stat. 30 G. 3,



c. 79,) comprised vicarial tithes according to the true construction and meaning of the said first-mentioned act. On the part of the appellant it was argued that, according to the true construction of the first-mentioned act, the words "other tenement" in the said clause did not include the vicarial tithes in respect of which he was rated. The Sessions decided in favour of the respondents, subject to the opinion of this court.

If the court should be of opinion that, according to the true construction of the first-mentioned act, the words "other tenement" in the said clause do not comprise vicarial tithes, then the said rate was to be quashed: but, if the court should be of the contrary opinion, the rate was to stand confirmed.(a)

\**Chambers and J. J. Johnson* in support of the order of Sessions. [456  
The words "or other tenement," in sect. 8, comprehend tithes.  
It has been held, in the case of a poor-rate imposed by a private [457  
act, that the \*parson "ought not to be exempted but by express

(a) The following sections of stat. 30 G. 3, c. 79, were referred to in argument, besides those set out in the text.

Sect. 9 enacts "That the rate or assessment so made shall be payable quarterly, at," &c., "one half of which said rate or assessment shall be paid by the owner or landlord of the premises so assessed, and the other half by the occupier or tenant thereof."

Sect. 10 enacts "That the tenants or occupiers of any land and tenements as aforesaid, shall pay the whole of such rates and assessments on what they hold and occupy, and shall and may deduct out of his or her rent, payable to the landlord or owner thereof, one half of such rate and assessment; and such landlord or landlords is and are hereby required to allow to such tenants such payments and deductions accordingly; and every tenant paying such part of the said rate or assessment upon his landlord's account, and producing a receipt for the same, shall be acquitted and discharged from so much money as the same shall amount to, as fully and effectually as if the same had been paid to any such landlord or landlords, owner or owners, or any person to whom his or her part was or should have been paid or payable."

Sect. 12 enacts "That the said rates or assessments shall be collected quarterly; and that if any person or persons shall refuse, neglect, or omit to pay the sum or sums of money which he, she, or they shall be rated or assessed, for the space of thirty days, after personal demand being made thereof, or demand in writing left at the place of abode or habitation of such person or persons, then, and in every such case, it shall and may be lawful to and for the said collector or collectors, receiver or receivers, and he and they is and are hereby authorized," &c. (power to distrain;) and, if the goods of the person refusing, &c. "shall be locked up, or secured, or secreted, or removed, so that the said collector, &c. "cannot legally distrain the same," then, &c. (power given to justices to commit to prison for any time not exceeding three months, or until payment.)

Sect. 13 enacts "That when any person or persons who shall be rated or assessed by virtue of this act shall quit his, her, or their land, dwelling-house, warehouse, shop, vault, mill, or other tenement, for or in respect whereof he, she, or they respectfully shall be so rated or assessed as aforesaid, before he, she, or they shall have paid his, her, or their said rate or assessment, and shall afterwards refuse to pay the same when due, and demanded by the person or persons authorized and appointed to collect and receive the same, that then and in every such case it shall and may be lawful to and for the said collector or collectors," &c. (power to distrain the goods, by warrant of justices to be granted into any place within their respective jurisdictions, or out of the limits thereof, such warrant being first backed or countersigned by some magistrate in the county, &c. where the distress is to be made.)

Sect. 15 enacts "That it shall and may be lawful to and for any receiver or collector to be appointed in pursuance of this act, or any other person or persons to be appointed by the said trustees, or any five or more of them, for that purpose, at all convenient times, to inspect the books of assessments or rates of the poor, or land-tax for the said parish, in order to ascertain the rates and assessments to be raised and levied by virtue of this act and to take copies thereof, if necessary, at the expense of the said trustees."

words, being liable before," by the express words of stat. 43 Eliz. c. 2, s. 1; and therefore he was deemed ratable under the private act, though that mentioned only "lands and tenements;" *Rex v. Skingle*, 1 Str. 100. In 3 Burn's Eccl. Law, 353, 9th edit., tit. *Privileges and Restraints of the Clergy*, sect. iv., after a statement that anciently "it was held, that clergymen are not to be burdened in the general charges with the laity of this realm, neither to be troubled or encumbered, unless they be specially named and expressly charged by some statute," it is said: "But now the contrary doctrine prevails, that clergymen are liable to all charges by act of parliament, unless they are specially exempted;" which is laid down in *Webb v. Batchelor*, 2 Lev. 139. In *Powell v. Bull*, 1 Comyns's Rep. 265, it was held that "tenements," in a local act for the maintenance of the poor,<sup>(a)</sup> immediately following the words "lands, houses," comprehended tithes, parcel of a rectory. A meaning must be given to all the words of the act. A strong instance of this appears in 2 Darris on Statutes, 757, 758. There, after stating the rule that "a statute which treats of things or persons of an inferior rank cannot, by any general words, be extended to those of a superior," a passage is cited from Lord Coke's commentary on stat. 52 H. 3, (Marlebridge,) c. 19, in 2 Inst. 137. The enactment is: "Touching essoins, it is provided, that in counties, \*458] hundreds, or in courts barons, or in other courts, \*none shall need to swear to warrant his esoin:" and Lord Coke says: "These general words are interpreted to extend to the king's courts of record at Westminster, and other courts of record, although the act beginneth with inferior courts, as is manifest by common experience: and the cause is, for that otherwise these general words should be void, for it cannot according to the general rule extend to inferior courts; for none be more inferior or lower than these, that be particularly named, and so note a just exception out of the general rule." Here, if no word intervened between the words "land, house," and the words "or other tenement," the case would be directly within the rule in *Rex v. Skingle*, 1 Str. 100, and *Powell v. Bull*, 1 Comyns's Rep. 265, but the intervening words relate to inferior subjects, "shop, warehouse, vault, mill:" and, unless the general words can be satisfied by some subject inferior to these, the rule in 2 Inst. 137 applies. [COLERIDGE, J. I cannot quite understand how you fix the order of precedence in such things: we know that certain courts are inferior to others.] If there be no rule of precedence applicable, there is nothing to limit the generality of the words. [COLERIDGE, J. In *Rex v. Skingle* and *Powell v. Bull*, it appears to have been understood that the private act took the place of stat. 43 Eliz. c. 2, so that the vicar, if not rated under the private act, would be relieved from his antecedent liability altogether: but here does the local act supersede the ordinary

(a) Stat. 9 & 10 W. 3, c. 37, private, "for erecting hospitals, and workhouses within the town of Colchester, in the county of Essex, for the better employing and maintaining the poor thereof." This appears to be the same act as that cited in *Rex v. Skingle*, *supra*.

church rate?] The statute here seems passed for rebuilding the whole church: there is no reason for exempting the vicar rather than the other parishioners. All will \*pay under the general liability to church rate, or all are exempted from it. [COLERIDGE, J. He will probably insist that the words must be applied to subjects *ejusdem generis* with those expressly named.] The inference from sect. 15 is that the vicar should be rated: for the rate is to be ascertained by reference to the poor-rate and land-tax, to both of which he would be rated. It is no answer that the inspection of these rates might be important with a view to the assessment of the inhabitants in general; for their assessment to the poor-rate and land-tax is made on the assumption that the vicar is proportionably rated: if he is not to be so rated under this act, the inspection would mislead. [COLERIDGE, J. The inspection might show the value of the property rated.] *Rex v. Barker*, 6 A. & E. 388,(a) is a strong authority in favour of the order of sessions: the words are nearly the same as here. So in *Rex v. The Trustees for paving Shrewsbury*, 3 B. & Ad. 216, the word "hereditaments" was held to include ground occupied by a gas company, because meadow and pasture ground appeared to be spoken of as hereditaments in the act. In *Rex v. The Manchester and Salford Waterworks Company*, 1 B. & C. 630, the words "other tenements" were held not to comprehend land occupied by the pipes, &c. of a water company: but there the statute appeared purposely to avoid rating lands; and upon this the judgment turned: and *Rex v. Mosley*, 2 B. & C. 226, where the words were held not to include the profits of markets, was a decision on the same act, and was decided on the authority of the former case. In *Colebrooke v. Tickell*, 4 A. & E. 916, the words "tenement" \*and "hereditament," in an act, were held to be confined to corporeal hereditaments only. In that case there were two acts on the same matter; in the former the words could not be applied to incorporeal hereditaments; and the words in the second were therefore restrained in their application. The principles upon which it was held, in *Bally v. Wells*, 3 Wils. 25,(b) that a covenant in a lease for years of tithes will run with the tithes, seem to confirm the doctrine that they fall within the same class of tenements as lands. In *Gully v. Bishop of Exeter*, 4 Bing. 290, 296, where an advowson in gross was held to be a tenement, the court pointed out that "tenement" was the only word used in the statute *de donis*, 1 stat. 13 E. 1, c. 1. Sect. 8 here uses the word "inhabit:" but that term is not confined to residents; and indeed the vicar must reside. Here, however, it is used in a large sense: the narrower meaning is expressed by "place of abode," in sect. 12.

Sir *F. Kelly*, Solicitor-General, and *Creasy*, contra. The burden of proof lies on the party seeking to impose a tax. Independently of express

(a) And see *Brown v. Lord Granville*, 10 Bing. 69.

(b) See note (12) to *The Dean and Chapter of Windsor v. Gorer*, 2 Wms. Saund. 304 a.

- lowing them must be taken to include only subjects *ejusdem generis*. Which of these rules is to prevail? Perhaps in the present case they are not actually in conflict; for, as the Solicitor-General suggested, we might possibly give effect to the words "other tenement" by treating them as including barns or factories and excluding tithes. The words come after the words "land, house, shop," and the like, and, as I should say, were meant to include subjects *ejusdem generis*, particularly when we look at sections 9 and 13, which, though not, of themselves, sufficient to warrant us in excluding tithes, yet confirm the argument that the words "other tenement," in sect. 8, were intended to include only what was *ejusdem generis* with the things before specified.

COLERIDGE, J. I am of the same opinion. I do not think that any of the cases throw much light upon the question; for, as was to be expected, each is decided \*upon the particular words in each. We  
 \*465] must, therefore, recur to general principles. And I really think that all the general rules which have been established may be consistently satisfied by our present decision. Without insisting too strongly upon the argument that the statute is imposing a tax and must therefore be strictly interpreted, it is impossible not to attach some weight to that consideration. Then, as to the words which precede "other tenement," they are express, "land, house, shop," and so on: as to the words "other tenement," there is enough doubt, to say the least, to entitle us to say that the rule of construing the statute strictly will not be satisfied if tithes be included. Next, what is the effect of the word "inhabit?" It cannot mean that a vicar, merely as inhabitant, shall be assessed in respect of his tithe only. Looking at the words alone, I think that the first principle mentioned by my brother PATTESON need not affect the view which I take, and the other cannot. The special words by no means exhaust every kind of subject matter *ejusdem generis*; so that effect may well be given to the words "other tenement," without including tithes. As to the rule of confining a general word when it follows special words, by referring it to the same sort of subject matter, we cannot perhaps bring this case exactly within the doctrine, in 2 Inst. 137, respecting the inferiority of one subject matter to another. But the analogy is sufficiently close. Where we find every thing which is expressly mentioned to be of a corporeal nature, we should certainly not expect to find that the general word meant any thing not corporeal, and should be disposed to say that tithes were not included; although, if that view were inconsistent with  
 \*466] what we found in \*other parts of the statute, we might be unable to act upon it. Now Mr. Chambers referred to sect. 15, which gives power to inspect the poor-rate for the purpose of ascertaining the proper assessments. But such a power was useful for enabling the receiver to get the value of any corporeal hereditament which was to be assessed: and no other clause is shown to be inconsistent with the principle that corporeal hereditaments alone are included. On the side of th

appellant, it is contended that some clauses do show the limit upon which he insists. I agree that none of them are conclusive: yet all of them are strong enough to produce an inclination of opinion; all seem to point to corporeal hereditaments. Sect. 10 speaks of rent being paid by tenants or occupiers; sect. 13 speaks of a rated person who "shall quit" the "land," &c., re-enumerating all the subject matters of sect. 8. Looking, therefore, at the whole statute, I think the safer opinion is that the vicar is not ratable here in respect of tithe.(a) Order of Sessions quashed.

(a) Wightman, J., was absent.

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The QUEEN against The GREAT WESTERN Railway Company.  
*Thursday, January 22d.*

Reported, 6 Q. B. 179.

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\*CROW against FALK and Another. *Friday, January 23d. [\*467*

Plaintiffs and defendants agreed by charter-party that a ship, then at Liverpool, of which plaintiff was master, should, with all convenient speed, be made ready, and should, at L., receive and load from the charterers' agents a full cargo, and, being so loaded, should proceed to Stettin and deliver the same and so end the voyage, restraints of princes, &c., "during the said voyage, always mutually excepted;" and the ship was to be loaded at L., without detention; and defendants thereby agreed to load the vessel at L., as in the charter-party stated, with the said cargo, at L.

On general demurrer to a declaration in assumpsit assigning for breach of the above agreement that defendants did not load the ship at L. without detention, but detained her at L. an unreasonable time (not negating restraints of princes, &c.): *Held,*

That the exception as to restraints of princes, &c., was applicable only after the ship quitted Liverpool.

**ASSUMPSIT.** The first count stated that, before the making of the promise, &c., to wit, 8th March, 1844, plaintiff was master of a ship called the Tweed, then at Liverpool; and thereupon, by a certain agreement then made by and between plaintiff of the one part and defendants of the other part, it was mutually agreed, &c., that the ship, being tight, &c., should, with all convenient speed, be made ready, and should, at Liverpool, receive and load from the charterer's agents a full and complete cargo of white salt, (describing it,) and, being so loaded, should therewith proceed to Stettin, or so near thereunto as she might safely get and deliver the same, agreeably to bills of lading, and so end the voyage, (restraints of princes and rulers, the dangers of the seas and navigation, fire, pirates and enemies, during the said voyage, always mutually excepted,) fourteen running days, &c., (stipulations for discharge at Stettin,) and the ship was to be loaded at Liverpool without detention; and the defendants did thereby promise and agree to load the vessel with the said cargo at Liverpool, and also to receive the same at the port of delivery, as in the said agreement stated; and that they, the defendants, should and would

\*468] pay freight, &c., and that they should and \*would pay demurrage, the sum of 3*l*. British sterling per day, to be paid day by day for each and every day the vessel should be detained over and above the said laying days and time hereinbefore mentioned, but that the said vessel should not be required to remain on demurrage longer than ten days; the cargo to be delivered alongside and taken from alongside the vessel, within reach of her tackle, at the expense and risk of the charterers: and for the true performance of the said agreement the plaintiff did thereby bind himself his heirs and assigns, the said vessel, &c., and the defendants did in like manner bind themselves, their heirs and assigns, and the cargo, &c., each unto the other, in the penal sum of 200*l*. And thereupon, afterwards, to wit, on, &c., in consideration of the premises, &c., (mutual promises to perform the agreement.) Averment, that plaintiff continually, from the time of making, &c., has performed, &c. That afterwards, after the making of the agreement and promise by defendants, and before the breach of promise by defendants firstly hereinafter mentioned, the ship being then tight, &c., was, at Liverpool, with all convenient speed, and within a reasonable time for that purpose, made, and was there ready to receive and load from the defendants or their agents such cargo as in the agreement in that behalf mentioned and agreed on: and the ship continued there, thenceforth, until the time of the committing of the breach of promise, &c., next mentioned, ready as aforesaid to receive and load there from defendants, or their agents, such cargo as in the said agreement, &c.; and plaintiff continued to be, and was, during all the time last aforesaid, ready and willing to receive such cargo there, \*469] and to load the same, &c.: of all which, &c., (\*notice to defendants, within reasonable time, and before breach,) &c.

That, after the said vessel had been so made ready to receive the cargo, and after defendants had had such notice as aforesaid, and while the vessel continued to be and was at Liverpool, and so ready, and while plaintiff continued to be and was so ready and willing to receive the cargo and load the same on board the vessel, to wit, on, &c., a reasonable time for loading the said vessel, and within which the same vessel could and ought to have been loaded according to the true intent and meaning of the agreement, expired and elapsed: yet defendants, well knowing, &c., but contriving, &c., did not nor would keep their promise and agreement, but broke their said promise in this, to wit, that they did not nor would load or cause to be loaded the said vessel without detention, although they were, after the vessel was so ready and before the expiration of such reasonable time, and after they had had notice, to wit, on, &c., requested by plaintiff so to do, but therein wholly failed and made default; and, on the contrary thereof, defendants, after the expiration of such reasonable time, and while the ship continued to be and was so ready, and after defendants had such notice and were so requested as aforesaid, kept and detained the ship at Liverpool for a great and unreasonable time, to wit,



&c., by means of which plaintiff, during the time last aforesaid, lost the use and benefit, &c.

That afterwards, to wit, on, &c., the ship being tight, &c., did, in performance of plaintiff's promise and agreement, at Liverpool, receive and load from the defendants' agents a full and complete cargo, which was then shipped and loaded on board of the vessel by order of \*the defendants, and, being so loaded, &c., did afterwards, to wit, on, &c., proceed to Stettin aforesaid; averment of delivery of cargo, that the running days expired, and that the ship had not been, and was not, at the expiration of the said fourteen days, &c., discharged of her said cargo, although plaintiff was always, during the time aforesaid, ready and willing to deliver, &c., and although the ship was not prevented from discharging or being discharged of the same by any such restraint of princes or rulers, dangers of the seas or navigation, fire, pirates or enemies, as in the said agreement mentioned: That, after the expiration of the said fourteen, &c., the vessel was, without default on the part of plaintiff, kept and detained at Stettin aforesaid by the defendants and the consignee for a long space of time, to wit, twenty days over and above the laying days, &c.; and that 60*l.* became due and payable to plaintiff from defendants for demurrage, according to the true intent, &c.: Yet defendants, well knowing, &c., but contriving, &c., did not nor would, though often requested, pay the said sum, &c., to plaintiff, &c. [\*470]

That defendants further broke their promise, &c.: Averment that they did not receive the said cargo of, &c., at the port of delivery within the number of days allowed by the agreement; but, though no such restraint of princes, &c., (as above) prevented the vessel from being discharged within the fourteen, &c., and the demurrage days, the vessel was detained at Stettin by defendants and the consignee for the purpose of discharging, for and during a long, &c., to wit, ten days, over and above and after the expiration of the said ten demurrage days, contrary to the promise, &c. By means whereof plaintiff lost and was deprived of the use, &c.

\*The defendants pleaded a plea which it is unnecessary to set forth. Demurrer; and joinder. [\*471]

*Willes*, for the plaintiff. The plea is bad. (*G. Atkinson*, for the plaintiff, said that he could not support the plea, but objected to the declaration so far as related to the first breach.)(a) The defendants object to the declaration on the ground that, in the first breach, it is not alleged that the delay in loading at Liverpool was not occasioned by the restraints of princes or any of the causes excepted in the charter-party. But, even if it were true that the plaintiff was bound to negative, by anticipation, such an exception (b) when applicable to the breach, here the exception is not

(a) See *Hinde v. Gray*, 1 M. & Gr. 195, 201, note (a); *Monkman v. Shepperdson*, 11 A. & E. 411; *Slade v. Hawley*, 13 M. & W. 757.

(b) The argument on this point is omitted. Reference was made to *Vavasour v. Ormerod*, 6 B. & C. 430; *Thibault v. Gibson*, 12 M. & W. 88; *Simpson v. Ready*, 12 M. & W. 736; note (2) to *Thursby v. Plant*, 1 Wms. Saund. 233 a. See *Jones v. Clarke*, 3 Q. B. 194.

so applicable. It relates only to what takes place after the vessel has been loaded at Liverpool; for it is limited by the words "during the said voyage," and the voyage would commence when the vessel left Liverpool, and terminate on her arrival at Stettin. Indeed, if the words "mutually excepted" had not occurred, it might be contended, for the plaintiff, that the exceptions were for his benefit only.

*G. Atkinson, contra.* There would certainly be no necessity to negative the exception if it were inapplicable to the first breach. But it is applicable to the first, as well as to the second, in which the plaintiff \*472] does negative it, although, if he be right as to the first, he need not have negatived the exception as to the second, because whatever took place "at Stettin" was after the end of the voyage, according to the interpretation which it is sought to put on the word "voyage." But that word does not mean merely the passage from one port to the other: it comprehends the whole employment of the vessel in the adventure, and the words are equivalent to the words "during the said risk." A policy would attach at the time of the loading.

*Willes, in reply.* The word "voyage" cannot be enlarged as suggested. To give it such an effect, there must be either a custom of merchants or some special circumstance. The loading was to take place "at Liverpool." The words "during the said risk" would convey no meaning. A policy would not attach till the anchor was weighed, unless it contained the word "at" as well as "from." In the second breach, the averment was unnecessary, and was inserted only *ex majori cautela*.

*LORD DENMAN, C. J.* The words of the charter-party and declaration are perfectly clear. The end of the voyage is expressly marked out: the beginning is not; but the voyage could not begin before the ship's loading was completed: the exception is confined to the time during the voyage; and the breach takes place before it begins.

*PATTESON, J.* The ship, being at Liverpool, is to be made ready, and there receive the loading; and she is then to proceed to Stettin. "During the said voyage" can apply only to the time after the voyage commences. In a policy of insurance the word "at" would be \*473] inserted in order to cover the time while the vessel was in port. It is quite clear that the exception does not apply to that part of the contract to which the breach relates.

*COLERIDGE, J., concurred.*

Judgment for the plaintiff. (a)

(a) Wightman, J., was absent.

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The QUEEN against DAVID SMITH. *Saturday, January 24th.*

Reported, 7 Q. B. 543.

**BRAITHWAITE against GARDINER. Tuesday, January 27th.**

In an action by a *bonâ fide* endorsee, against the acceptor of a bill of exchange, the defendant is estopped from pleading that the drawer and the first endorser was an uncertificated bankrupt when the acceptance was given.

**ASSUMPSIT.** The first count was on a bill of exchange for 76*l.* 6*s.* 4*d.*, drawn by G. D. Clark upon defendant, 15th April, 1844, payable to the order of him the said G. D. Clark at three months, accepted by defendant, and endorsed by Clark to Joseph Banks, who endorsed to plaintiff.

**Plea.** That, before the making and accepting of the said bill, to wit, on, &c., and from thence, &c., Clark was a trader, &c.: that Clark was indebted and became bankrupt, and a fiat issued, by virtue of which Joshua Evans, Esq., then being a commissioner, &c., adjudged Clark a bankrupt: the plea then set out the further proceedings, down to the appointment of an official assignee, (Patrick Johnson,) and subsequent choice of other assignees (Harbut John Ward and Alexander \*Speid Livingstone) by the creditors, ratification of such last-mentioned choice by a commissioner, and acceptance of the appointment by Ward and Livingstone before the making and accepting of the said bill of exchange. Averments: That the said G. D. Clark hath never at any time obtained his certificate under the said fiat, nor hath any certificate ever at any time been signed, sealed, made or granted by the said Joshua Evans, Esq., such commissioner as aforesaid, or by any other commissioner of the said Court of Bankruptcy, certifying the conformity of the said G. D. Clark to the laws in force concerning bankrupts at the time of the issuing of the said fiat: And that the said bill of exchange was made and accepted after the bankruptcy of the said G. D. Clark as aforesaid: And that afterwards, and after the commencement of this suit, to wit, on, &c., the said P. Johnson and H. J. Ward, and A. S. Livingstone, as assignees as aforesaid, required defendant to pay them the said bill of exchange in the first count mentioned and the whole amount thereof: by reason of which premises, and by force of the statute in that case made and provided, the said P. Johnson and H. J. Ward and A. S. Livingstone became and were entitled to the amount of the said bill of exchange, and to the several sums and causes of action in the first count mentioned. Verification. [\*474]

General demurrer, and joinder.

**Peacock**, for the plaintiff. First, the defendant, having accepted a bill drawn by Clark, payable to Clark's own order, is estopped from saying that Clark could not draw such a bill; for, if his present defence be available, he has, by accepting, contributed to a fraud. \**Pitt v. Chappelow*, 8 M. & W. 616, is in point. Secondly, the plea, if pleadable at all, ought to have shown the consideration to be such that the debt would pass to the assignees. If, for example, the consideration had been damages recoverable for an assault, the debt would not have passed to them. [PATTERSON, J. The bill might have been drawn for money due in respect

of personal services done by the bankrupt, after bankruptcy.] It might have been accepted for the drawer's accommodation, and discounted by the plaintiff.

*Lush*, contra. It cannot be presumed that an acceptance was given otherwise than for value. That, or any other circumstance, showing that the bankrupt drew the bill as a mere trustee, or otherwise defeating the claim of the assignees, ought, at all events, to have been replied. If the bill had been accepted for services, as suggested, it was still property which, *primâ facie* at least, would pass to the assignees. *Kitchen v. Bartsch*, 7 East, 53, is an authority on this point, and shows also that the defendant, though he has dealt with Clark, the drawer, as a person having property, may now allege that, as a bankrupt, he could have none. In *Pitt v. Chappelow*, the plea did not allege, as is done here, that the assignees interposed and claimed the debt.

*Peacock*, in reply. The consideration for the bill is not within the knowledge of a party suing merely as holder; he, therefore, cannot be expected to reply it. [WIGHTMAN, J. A person taking a bill from an uncertificated bankrupt is bound to use caution. In a legal \*view, \*476] the plaintiff must be taken to have had notice of the bankruptcy.] So had the acceptor; yet he, by accepting, holds out that he will pay to the bankrupt's order. At least, if there were any case in which he would not be liable, he is bound to show, in pleading, that it exists here. [WIGHTMAN, J. If there was a good consideration for the acceptance, the assignees are entitled to interfere; and is the acceptor liable both to them and to the bankrupt?] He should have taken care to know whether the assignees would interfere or not before he accepted. If he be now under a difficulty in this respect, he cannot avail himself of it against a holder who, by the acceptance, has been led to expect that payment will be made to himself. [Lord DENMAN, C. J. How do you meet the case of *Kitchen v. Bartsch*?] There it was the bankrupt himself who sued. [COLERIDGE, J. The bankrupt being endorser, it may be assumed that he has received value from the endorsee, the amount of which ought to find its way to the assignees. PATTESON, J. In *Pitt v. Chappelow*, the actual ground of decision was that the proceedings in bankruptcy were not fully set out.] But Lord ABINGER expressed a strong opinion on the point of estoppel. [PATTESON, J., referred to *Sanderson v. Collman*, 4 M. & G. 209.]

Lord DENMAN, C. J. Lord ABINGER was a high authority on subjects of this kind: it is clear what his opinion was on the point of estoppel in *Pitt v. Chappelow*; and I think it rests on sound principles. In \*477] \*this case, all parties knowing the bankrupt's situation, the defendant accepts a bill drawn by him. He thereby admits that the bankrupt had power to draw upon him: and, therefore, on a short and simple ground, which is always the best, I am of opinion that the plaintiff has a right to maintain the action. We thought at first that *Kitchen v. Bartsch* was an authority against the plaintiff: but on examination it is

found not to be so. It is contended here that the endorsee of a bill drawn by a bankrupt is bound to reply the circumstances which prevent the bankruptcy from defeating his right; but they may not always be within his knowledge; and, the defendant having accepted the bill, any person to whom he has tendered the engagement implied by such acceptance is entitled to say at once, "I will hold you to that engagement." The argument assumes the contrary.

PATTESON, J. I find no direct authority on this point. The decision in *Pitt v. Chappelow* proceeded on a different ground; but the opinion there expressed by Lord ABINGER is very strong. The case of an action by the drawer himself may be different from that in which an action is brought, as here, by the endorsee of a subsequent endorser. I think the plaintiff is entitled to judgment.

COLERIDGE, J. The acceptor is estopped, as against all whose situation he has altered with knowledge of the facts, by accepting. The acceptance here was given after all the proceedings in bankruptcy; and the defendant, having known of these, now says to the endorsee, [\*478 "I will not pay you, who claim under the person to whom I held out the bankrupt as capable of drawing a bill." *Kitchen v. Bartsch*, where the drawer himself brought the action, was a very different case.

WIGHTMAN, J. We must assume here that the endorsee who sues was a bonâ fide holder, and for value. Then the opinion expressed by Lord ABINGER, in *Pitt v. Chappelow*, is a very strong authority for the plaintiff. In *Kitchen v. Bartsch*, as has been already observed, the bankrupt himself was the drawer, and the answer which availed against him as a plaintiff cannot serve an acceptor who, of his own authority, has made the bill of the bankrupt negotiable, and is sued upon it by a bonâ fide holder.  
Judgment for plaintiff.

**\*SARAH HAWKINS and WILLIAM COLE against ROBERT BENTON. [\*479  
Tuesday, January 27th.**

Disputes were pending between H. and B., and also between C. and B., concerning the same premises; and H. had sued B. in trespass for breaking and entering the said premises. By consent of H. B. and C., a judge's order was made, in the action of H. against B., that a verdict should be entered for H., with damages, subject to the award of an arbitrator, who was to direct for whom and for what sum the verdict should be entered, and should settle all differences between H. and B., and between C. and B.

The arbitrator awarded that the proceedings in the cause should cease; and that H. had good cause of action against B. and was entitled to a verdict; and he assessed the damages at 40s., to be paid by B. to H. and to C., who, as the award stated, consented to become a party in the cause.

*Held*, a good award.

DEBT. The declaration stated that, whereas, divers disputes, &c having arisen and being depending between the now plaintiff Sarah Hawkins and the now defendant Robert Benton, of and concerning certain premises and buildings, and whereas, also, divers disputes, &c. having

arisen and being depending between the said plaintiff William Cole and the now defendant, of and concerning the said premises and buildings, the plaintiff S. H. heretofore, to wit, on, &c., commenced an action at law in the Queen's Bench against the now defendant and one John Smith, acting as bailiff and servant of defendant R. B. in that behalf, for breaking and entering the said premises, and taking certain goods and chattels therein: which action, at the time of making the order hereinafter mentioned, was depending and undetermined: and whereas, while the action was so depending, and while the said several disputes were so depending, it was agreed, by and between the said several parties to the said suit, and by and between the said several parties and the said W. C., that it would be for the benefit of all the parties aforesaid and of the said W. C. that the said cause and all the several matters in difference in the introductory part of this count mentioned, as well as all other matters \*480] then in difference, if \*there should then be any such, between the parties to the said suit, and all other matters in difference, if there should be any such, between the said defendants and the said W. C., should be referred to arbitration: and thereupon, to wit, on, &c., by an order, &c., (of a judge of Q. B.) made in the said action, dated, &c., it was, amongst other things, ordered, with the consent of the attorneys on both sides of the said cause, and also with the consent of the attorney of the said W. C., that a verdict in the said cause should be entered for plaintiff S. H., for 50*l.*, subject to the award of R. A., Esquire, Barrister at law, who should be at liberty to order, &c., for whom, and for what sum, the verdict should be finally entered: and it was, by the said order and with such consent, referred to the award, order, arbitrament, final end and determination of the said R. A. to settle all matters in difference between the said parties to the said action, and between the defendant and the said W. C., who consented to be made a party thereto, and to order and determine what he, R. A., should think fit to be done by either party respecting the matters in dispute: who thereby agreed to be bound and concluded by such determination, &c., so as the said R. A., &c. (provisions as to time of making the award, &c.) and that the costs of the cause should abide the event of the said cause, and that all other costs should be in the discretion of the said arbitrator, who should direct and award to and by whom, and in what manner, the same should be paid, and should possess the same powers as a judge at Nisi Prius, and be at liberty to examine the parties and witnesses upon oath: and also, &c., (provisions that the parties should not bring actions, &c. against the ar- \*481] bitrator; and provision against delay by the parties, \*and for making the order of reference a rule of court.) Averment that Smith died before an award was made.

The declaration then stated that R. A. made and published his award, and did thereby award, adjudge and determine that all further proceedings in the said cause should from thenceforth cease and be no further



prosecuted, and that the said plaintiff had good cause of action against the said defendants in the said cause, and was entitled to a verdict therein; and did thereby assess and award the damages at the sum of 40s. to be paid by the said defendants to the said plaintiff S. H. and W. C., who consented to become a party in the cause:" and that the costs of the reference and award should be paid by the defendants. Of which award the now defendant afterwards, to wit, on, &c., had notice. That afterwards, to wit, &c. (order of reference made a rule of court.) That, at the time of making the order of reference, and from thence until after the making the award, there were not any matters in difference between the said plaintiff S. H. and the defendants in the said suit, or either of them, or between W. C. and the said defendants in the said suit, or either of them; nor were there any other matters, differences or questions brought before the said arbitrator, nor was the award of the said arbitrator made or given in respect of any causes or matters in difference whatsoever other than the controversies and disputes in the introductory part of this count mentioned.

That the costs of the action, reference and award, afterwards, to wit, &c., were duly taxed at, to wit, 175l. 5s., of all which said premises, &c. (notice to defendant.) Yet defendant did not pay the 40s. nor the 175l. 5s.: whereby an action, &c.

General demurrer. Joinder.

\**Gray*, for the defendant. The award as set out is bad. It appears from the declaration that the order of reference was made in an action depending between the plaintiff Hawkins and the defendant. That action was referred, as well as, by the consent of Cole, all matters in difference between Hawkins and Benton and between Cole and Benton. The arbitrator was to direct for whom and for what sum the verdict was to be entered: and that was a matter merely between Hawkins and the defendant. He was also to make an award, respecting all matters in difference, between Hawkins and the defendant and between Cole and the defendant. As to the verdict, he awards that the proceedings in the action are to cease, and that the plaintiff had good cause of action, and assesses the damages at 40s., but directs them to be paid to Hawkins and Cole. Now Cole had nothing to do with the action, nor consequently with the damages. The damages, as between Hawkins and the defendant, might have been less than 40s. [PATTERSON, J. Is not the substantial effect of the award, that the plaintiff is entitled to a verdict? The award does not say that the verdict is to be entered for Cole, but only that the damages are to be paid to him and Hawkins: what can that signify? COLERIDGE, J. The arbitrator may have thought that Cole had an equitable interest in the damages to be recovered by Hawkins.]

*Best*, contra, was stopped by the court.

*Per Curiam*.(a)

Judgment for the plaintiffs.

(a) Lord Denman, C. J., Patterson, Coleridge, and Wightman, Ja.

## \*483] \*CAROLINE BEAUMONT against HENRY REEVE.

*Tuesday, January 27th.*

A woman declared in assumpsit against a man, averring that defendant had seduced and debauched plaintiff, and induced her to cohabit with him, whereby she had been injured in her character and deprived of the means of procuring an honest livelihood; that the two had agreed to discontinue the immoral connection and live apart: and that defendant, as a compensation for the injury and in consideration of the premises, undertook to pay plaintiff a yearly sum towards her maintenance; which he had failed to do.

*Held*, a bad declaration, as disclosing no legal consideration for the undertaking.

**ASSUMPSIT.** The first count of the declaration alleged that, whereas, before the making of the promise of defendant after mentioned, defendant had seduced and debauched plaintiff, and had induced and procured her to cohabit with him as his mistress for a long time, to wit, five years, and plaintiff, by reason of the premises, had been and was greatly injured in her character and reputation, and prejudiced in and deprived of the means of procuring an honest livelihood, and otherwise damnified; and whereas, before and at the time of making the promise, &c., plaintiff had ceased to cohabit with, and then lived apart and separate from, defendant; and thereupon heretofore, to wit, on, &c., it was agreed between plaintiff and defendant that they should continue to live apart from each other, and that no immoral intercourse or connection should ever again take place between them; and defendant, as a compensation for the injury so sustained by plaintiff, and in consideration of the premises, then undertook and promised plaintiff to allow and pay her yearly, from the said day, &c., during her life, towards and for her support and maintenance, an annuity of 60*l.*: that, although plaintiff and defendant did not, at any time after the making of the promise of defendant, reside or cohabit together: Yet defendant, disregarding, &c., hath not allowed or paid the annuity, &c., although often requested; and a large, &c., to wit, 60*l.* of the annuity, for one year, ending upon, &c., now is due, &c. Special \*demurrer, assigning for

\*484] cause the grounds insisted on in the argument. Joinder.

*Crompton*, for the defendant. The declaration is bad in substance, as disclosing no legal consideration for the promise. In *Binnington v. Wallis*, 4 B. & Ald. 650, the declaration recited that the plaintiff had cohabited with the defendant as his mistress, whereby she had been injured in her reputation; that they had ceased to cohabit; that the two had agreed that no immoral intercourse should again take place between them, and defendant, as a compensation for the injury sustained by plaintiff, should pay her an annuity while she continued of good and virtuous life; and thereupon, in consideration of the premises, and that plaintiff would give up the annuity, defendant undertook to pay her its worth: and it was held that no consideration was disclosed, the plaintiff giving up only that which was of no value, inasmuch as she could not have enforced the original agreement for want of consideration. [PATTERSON, J. The defendant's

counsel there pointed out that the declaration did not aver that the plaintiff had been seduced; and the court seemed to think that an averment of seduction by the defendant would have supplied the defect: here that appears.] That makes no difference. A promise to induce cohabitation would clearly be illegal: here the consideration is only void. Where a part of a consideration is illegal, it vitiates the whole; where it is simply void, the remainder of the consideration, if good, will support an assumpsit.<sup>(a)</sup> In *Jennings v. Brown*, 9 M. & W. 496, where a consideration appeared, similar to that in the present action, the action was supported on the ground that there was also a good consideration, [\*485 namely, that the plaintiff would support a child which was the fruit of the intercourse: and PARKE, B., said that it made no difference, as to the invalidity of the former consideration, that the defendant had seduced the plaintiff. [PATTESON, J., mentioned *Gibson v. Dickie*, 3 M. & S. 463.] There the consideration was future, that the plaintiff should not cohabit with a third party, or any one else: and the court held that this was a valid consideration and would support the action, nothing illegal appearing: the case was compared to that of an annuity to a widow dum castè vixerit. The decisions on bonds are inapplicable: a bond needs no consideration: it is sufficient that there is not an illegal one. This explains *Marchioness of Annandale v. Harris*, 2 P. Wms. 432, and *Turner v. Vaughan*, 2 Wils. 339. [PATTESON, J., referred to *Walker v. Perkins*, 1 W. Bl. 517.] That was the case of a bond upon consideration positively illegal. [WIGHTMAN, J. The declaration here alleges that the plaintiff was injured in her character, and deprived of the means of procuring an honest livelihood.] That is a mere aggravation of the seduction: but the seduction raises no consideration. The word has no legal meaning. [WIGHTMAN, J. There is the word "debauched."] That does not necessarily mean that the plaintiff was chaste before her connection with the defendant. At the utmost, there is no more than what has been called a moral consideration, which, it is now settled, will not support an assumpsit, even with an express promise; \**Eastwood v. Kenyon*, 11 A. & E. 438, and other cases cited in note (e) to *Barber v. Fox*, 2 Wms. Saund. 137 e,<sup>(b)</sup> which support the doctrine in note (a) to *Wennall v. Adney*, 3 B. & P. 247, 252, that even an express promise upon a mere moral consideration does not support an assumpsit, but "can only revive a preceding good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision." *Lee v. Muggeridge*, 5 Taunt. 36, must now be considered as

(a) See note (e) to *Barber v. Fox*, 2 Wms. Saund. 137 h.

(b) See note (a) to *Osborne v. Rogers*, 1 Wms. Saund. 264 a, and *Kaye v. Dutton*, (there referred to,) 7 M. & G. 807.

overruled by *Littlefield v. Shee*, 2 B. & Ad. 811, and other authorities already referred to. (He was then stopped by the court.)

*Banks*, contra. It must be conceded that a promise to pay money in consideration of future cohabitation would be illegal: but it is otherwise when the consideration is past cohabitation. There, although the promises will be void if it does not appear that the defendant seduced the plaintiff; *Binnington v. Wallis*, 4 B. & Ald. 650; yet, as there pointed out, the invalidity results from the absence of such an allegation. Here the allegation is expressly made; and therefore the case falls within the authority of *Marchioness of Annandale v. Harris*.

\*487] \*Lord DENMAN, C. J. I think *Binnington v. Wallis*, 4 B. & Ald. 650, connecting it with the dictum of PARKE, B., in *Jennings v. Brown*, 9 M. & W. 496, directly in point. The moral consideration, which alone appears here, cannot support an assumpsit. That principle has been lately acted upon by this court in *Eastwood v. Kenyon*, 11 Ad. & E. 438, where we adopted the doctrine laid down in the note to *Wennall v. Adney*, 3 B. & P. 249, note (a). The result is that an express promise cannot be supported by a consideration from which the law could not imply a promise, except where the express promise does away with a legal suspension or bar of a right of action which, but for such suspension or bar, would be valid. This result we arrived at, after much deliberation; and we now adhere to it.

PATTESON, J. This declaration appears to be framed on a view suggested by some expressions in *Binnington v. Wallis*, which point to a distinction between that case and cases where the defendant is the seducer of the plaintiff. But, looking at *Eastwood v. Kenyon*, and *Jennings v. Brown*, it is clear that that circumstance is of no consequence as to the legal right. The seduction could give the plaintiff no direct right of action, and can therefore create no liability of any kind from which a consideration can arise.

COLERIDGE, J. *Eastwood v. Kenyon*, which affirmed the doctrine in the note to *Wennall v. Adney*, has established the principle that a moral consideration will not support an assumpsit: there are certainly some  
\*488] \*apparent exceptions; but here we have only to act upon the general rule. In *Binnington v. Wallis*, the court did indeed suggest that the previous fact of the seduction might make a distinction; but that clearly is not so. The circumstance of previous seduction adds nothing but an executed consideration resting on moral grounds only.

WIGHTMAN, J. I felt some doubt in this case: but, on considering the point, I agree that a precedent moral obligation, not capable of creating an original cause of action, will not support an express promise. And clearly, on the authorities, there is nothing here to raise any obligation beyond that. We therefore must act on the doctrine laid down in the note to *Wennall v. Adney*. Judgment for defendant.

**\*BAILLIE against MOORE. Tuesday, January 27th. [\*489**

To assumpsit for money paid, &c., defendant pleaded, as to part, that, after the accruing of the causes of action, and before action brought, B. was indebted to defendant in a sum exceeding the sum pleaded to, by decree of a Scotch court, and was imprisoned to enforce payment: and that, after the accruing, &c., and before action brought, plaintiff was authorized by defendant to receive from B. the amount pleaded to, part of the debt from B. to defendant, and to retain and appropriate it in full satisfaction and discharge of the cause of action pleaded to, and to receive the residue from B., and hold it on behalf of defendant. That plaintiff, instead of receiving the amount pleaded to in satisfaction and discharge, elected to, and did, at the request of B., and without the knowledge or consent of defendant, receive and take from B. a bill of exchange to the amount of the sum pleaded to, for and on account of that amount, parcel of the debt due from B. to defendant, and appropriated and retained the bill to and for the liquidation and discharge of the moneys and causes of action pleaded to; and, without the license, &c., of defendant, authorized and procured the discharge of B. from imprisonment without receiving the residue of the debt owing from B. to defendant, and without any part of the residue being satisfied or discharged.

On special demurrer, objecting that the plea did not properly show accord and satisfaction, or set-off,

*Held, a bad plea.*

ASSUMPSIT for work done and materials provided, money paid, and on an account stated.

Plea, as to 40*l.* 6*s.*, parcel, &c., that, after the accruing of the last mentioned causes of action, and before the commencement of this suit, to wit, on, &c., one Henry Butters was indebted to defendant in a certain large sum of money, exceeding the amount of the money in the introductory part of this plea mentioned, amounting, to wit, to 150*l.*, by virtue of a decree theretofore, to wit, on, &c., duly made by the Lords of Council and Session in Edinburgh: that the said H. B., remaining and being so indebted, was then, to wit, on, &c., according to the laws then in force in that part of the United Kingdom, &c., called Scotland, imprisoned by due course of law, and was then lying in prison in a certain jail in that part, &c., to wit, in the jail, &c., in Glasgow, for and on account of the non-payment of the said debt so due from him to defendant, and in order to enforce payment of the same. And thereupon, afterwards, and after the \*accruing of the causes of action in the introductory part of this plea mentioned, and before the commencement, &c., to wit, on, &c., H. B. still remaining indebted to defendant, and still remaining so imprisoned, plaintiff was authorized and empowered by defendant to receive from H. B. the amount of the moneys in the introductory part of this plea mentioned, part of the moneys so due and owing from H. B. to defendant, and to retain and appropriate the said last mentioned moneys in full satisfaction and discharge of the causes of action in the introductory part, &c., and also to receive from H. B. the residue of the said debt so due and owing from H. B. to defendant, and to hold the said residue for and on behalf of defendant. That afterwards, and whilst H. B. remained so indebted to defendant, and so imprisoned, and whilst the authority so given by defendant to plaintiff continued in full force, unaltered and unrevoked, and before the commencement of this suit, to wit, on, &c., plaintiff, instead of so receiving from H. B. the amount of

the said moneys in the introductory part, &c., in satisfaction and discharge, &c., elected to receive and take, and did then, at the request of H. B., without the knowledge, authority, license or consent of defendant, receive and take, from H. B. a certain bill of exchange for the full amount of the moneys in the introductory part, &c., (the date of parties to, and other description of, which said bill of exchange is and are wholly unknown to defendant,) for and on account of the amount of the moneys in the introductory part, &c., parcel of the said debt so due and owing from H. B. to defendant; and plaintiff then and thenceforth appropriated and retained the said bill to and for the liquidation and discharge of the

\*491] moneys \*and causes of action in the introductory part, &c. That plaintiff, upon so then taking from H. B. the bill, then, to wit, on, &c., without the license, knowledge, authority or consent of defendant, authorized and procured the discharge of H. B. from his imprisonment, without receiving from H. B. the residue of the debt so due to defendant, and without H. B. or defendant (a) in any way satisfying or discharging the residue of the debt so due from H. B. to defendant, or any part thereof. And that defendant hath never at any time received from H. B. or plaintiff any part of the debt so due and owing from H. B. to him, defendant, before the discharge of the said H. B. from his imprisonment.

Special demurrer, assigning for cause, in substance, that the plea purports to be a plea in accord and satisfaction, and only states that plaintiff was authorized to receive of and from H. B. certain moneys in the plea mentioned, without going on to allege that plaintiff concurred or consented to the authority of defendant that plaintiff should pay himself out of the moneys he might receive from H. B. for defendant: And that, if the plea be in accord and satisfaction, it should show that plaintiff accepted the said debt or part thereof, so due from H. B. to defendant, in full satisfaction and discharge of plaintiff's cause of action: And for that the plea alleges only an accord without a satisfaction: And for that the plea begins as a plea in accord and satisfaction, but concludes by stating that plaintiff took a bill from H. B. without defendant's license, &c., and there can be no accord and satisfaction in law unless founded on

\*492] a contract express or implied: And for that, if the plea \*purports to be a plea of set-off, it in effect charges plaintiff with committing a breach of authority, and contains none of the requisites of such a plea, and a breach of duty, being a question of damages, could not be the subject of a set-off: And for that the plea alleges that plaintiff, without the license, &c., of defendant, authorized and procured the discharge of H. B. from his imprisonment without receiving from H. B. the residue of the debt so due to defendant, and without H. B. or defendant (b) in any way satisfying or discharging the residue of the said debt, which allegation is uncertain and unintelligible: And also for that defendant hath put

(a) Sic; apparently a mistake for plaintiff. See note (a), p. 492, post.

(b) This objection was not pressed.



in issue a matter of inference from the facts before alleged: And for that defendant hath not denied, confessed or avoided the substantial matter in the declaration alleged.

Joinder in demurrer.

*Petersdorff*, for the plaintiff. The plea offers no good defence, as showing either accord and satisfaction, or a substitution of a new debtor, or a set-off. First, there is no accord and satisfaction. The plea does not state any contract between the plaintiff and defendant that the bill should be taken from Butters by the plaintiff in discharge of the defendant's liability. Nothing is shown but an authority given by the defendant to the plaintiff to receive the debt from Butters in satisfaction and discharge of the debt of defendant to plaintiff. There is therefore no accord shown. Nor is there any satisfaction. It appears only that the plaintiff, being authorized to receive the money from Butters, elected, \*without [ \*493 authority, to take a bill of exchange in lieu of the money, for and on account of the debt now sued on, retained the bill to and for the liquidation and discharge of that debt, and discharged Butters from imprisonment. [PATTERSON, J. Suppose the plaintiff had taken the money from Butters; would not that be payment of the debt due from defendant to the plaintiff?] That might be so; the authority would then have been pursued. But here it is not averred that the defendant authorized taking the bill on account of that debt. The plaintiff's conduct, as described in the plea, is merely a non-pursuance of the authority given by the defendant, and a breach of the agreement between the two. There is no averment of assent by the defendant to the plaintiff's taking the bill. The whole is said to have happened after the cause of action accrued: now, after a cause of action is vested, it can be got rid of only by a release or by something in the nature of satisfaction or discharge. Nothing is said to have accrued from the bill: if it could even be considered as a collateral security for the debt owing from defendant to plaintiff, that would furnish no answer to the action. But, as the transaction is described in the plea, it is as if the plaintiff had taken a chattel belonging to the defendant and had refused to give it up till the defendant paid him: that, without more, would not satisfy the debt. Cases on the subject are collected in Com. Dig. *Accord*, (B 1.) [COLERIDGE, J. May not this be treated as an informal plea of payment? The statement is that the plaintiff elected to retain the bill, and appropriated it to the discharge of the debt owing from the defendant.] The defendant did not assent; nor is it said that the bill was paid. If a special verdict found the facts \*stated in the plea, that finding would not support a plea of pay- [ \*494 ment. It is not averred that the bill was taken as payment of the debt from defendant to plaintiff. Nothing is stated which would prevent the defendant from recovering against the plaintiff in trover for the bill. If an agent, authorized to obtain payment of a debt due to his principal, instead of doing so, takes a security to himself and discharges the debtor,

can that be treated as payment of a debt due from the principal to the agent? [PATTESON, J. A transaction like that was brought before this court in a case from the Northern Circuit.(a)] Secondly, the plea cannot be supported as showing a substitution of a new debt. That is a defence only where the substitution precedes the breach, as in *Taylor v. Hilary*, 1 C., M. & R. 741; S. C., 5 Tyrwh. 373.(b) Here the substitution is alleged to have taken place after the breach. Thirdly, the plea shows no set-off, inasmuch as there are not mutual debts between the plaintiff and the defendant.

*Peacock*, contra. This is, substantially, a plea of payment by a bill. If Butters had paid to the plaintiff the debt which he owed the defendant, that would have been payment to the plaintiff on behalf of the defendant, and would have discharged the defendant. It can make no difference that the plaintiff elects to take from Butters a bill instead of money. After that, the defendant could not have sued Butters. [Lord DEN-  
\*495] MAN, \*C. J. Why would the defendant have been bound by the unauthorized act of the plaintiff? *Smith v. Ferrand*, 7 B. & C. 19, shows that, if a debtor refers a creditor to a third person for payment, and the creditor gives that person indulgence, he, the creditor, discharges his own debtor. [PATTESON, J. The reason of that is that such a dealing is, in effect, a taking in payment. But you only plead that the authority to retain was given in satisfaction of the debt due from the defendant to the plaintiff: you say nothing of payment; nor do you aver that the defendant sanctioned the bill being given.] The statement is enough, coupled with the averment that the bill was appropriated by the plaintiff to the liquidation and discharge of the debt from the defendant. [PATTESON, J. Suppose Butters were now sued for the debt, and pleaded that he gave a bill for it to the present plaintiff, who took it without the authority of the present defendant: would that be a defence for Butters? COLERIDGE, J. In *Smith v. Ferrand*, it might be assumed that the defendant authorized the taking the bill from the third party: and there the third party offered payment in cash.] That, in effect, is equivalent to the facts here pleaded: the plaintiff elected to take the bill, instead of money, from Butters. In *Crowfoot v. Gurney*, 9 Bing. 372,(c) where a debtor assigned to his creditor a debt due to him, the debtor, from a third party, and the third party assented to pay such debt to the assignee when its amount should be ascertained, and it was in fact afterwards ascertained, after  
\*496] which the \*assignor became bankrupt, and then the third party paid the assignee of the debt, it was held that the assignee of the debt was entitled to retain the payment as against the assignees of the bankrupt, and that they could not recover it from the third party. [PAT-

(a) Probably *West v. England*, referred to in the argument in *Gifford v. Whittaker*, 6 Q. B. 249. In the last-mentioned case, the plea was held bad on general demurrer. See the authorities there cited.

(b) Petersdorff also referred to *Pearson v. Pearson*, 5 B. & Ad. 859.

(c) The marginal note there appears to be incorrect; and *quære* as to the judgment of Tindal, C. J., p. 375, l. 20; and p. 376, l. 4. See S. C. 2 Moore & Scott, 473.

teson, J. But here is nothing answering to the assent of the third party.] The third party assents by giving the bill to the plaintiff. The defence arising from such a transaction as this need not be expressly pleaded as accord and satisfaction. Suppose an action brought against a surety, and the defence to be that the plaintiff had given time to the principal, that would not be pleaded as accord and satisfaction. [PATTESON, J. No time appears to be given here. We do not know who the parties to the bill were: they might be strangers to the three. WIGHTMAN, J. Or the bill might be over-due.] If the plaintiff had received goods as payment, that would discharge the defendant. The present transaction comes to the same thing: he has changed the situation of the defendant with relation to Butters.

*Petersdorff*, in reply. It is urged that this is substantially a plea of payment: but, even assuming that to be so on general demurrer, the demurrer here is special, and points out that the plea does not expressly allege accord and satisfaction. If that had been done, or if the plea had stated that the bill was taken as money, the plaintiff would have traversed. It does not appear even that time is given to Butters. Nor is any thing shown which gives Butters a defence as against the defendant. But, at any rate, the plea should show that the defendant authorized the bill to be taken as payment for, or in satisfaction of, the debt from him to the \*plain- [497  
tiff. The proper form of putting such a defence appears from *Sard v. Rhodes*, 1 M. & W. 153; S. C., Tyrwh. & Gr. 298, and *Mallard v. The Duke of Argyle*, 6 Man. & G. 40.(a) In *Crowfoot v. Gurney*, 9 Bing. 372, there was an agreement by the three parties that the debt should be transferred: and in *Smith v. Ferrand*, 7 B. & C. 19, the jury were entitled to infer such an agreement from the evidence. *Kearslake v. Morgan*, 5 T. R. 513,(b) seems to have been the first case which decided that acceptance of a negotiable note on account of a debt was a discharge of the debtor: there *Cumber v. Wane*, 1 Str. 426, (c) was referred to, in which the note given did not appear to be negotiable, and the plea was held bad; in such a case the party taking the note in effect obtains nothing. The same principle applies here.

Lord DENMAN, C. J. If the defence intended be, that taking this bill was a giving and receiving it in discharge of the debt owing from the defendant to the plaintiff, it should have been so pleaded. If, again, the facts are insisted upon as payment, they should be so pleaded. As the plea stands, neither is done. One consideration, indeed, has weighed in my mind, namely, whether the discharge of Butters from prison by the plaintiff's procurement may not amount to an adoption by him of the authority given by the defendant, and so operate in satisfaction of the debt. But, in the first place, the accord and satisfaction should be formally pleaded:

(a) See *Sibree v. Tripp*, 15 M. & W. 23.

(b) See *Rex v. Dawson*, Wightw. 32; *Davis v. Gyde*, 2 A. & E. 623.

(c) See *James v. Williams*, 13 M. & W. 828.

\*498] and, in the second, the plea does not sufficiently explain the operation of the Scotch law.

PATTESON, J. It was intended, I suppose, to show either accord and satisfaction or payment. But, if accord and satisfaction was meant, the plea should have expressed that; if payment was meant, the plea should have stated that the plaintiff took the bill as payment: neither one nor the other is alleged: all that is said is, that the plaintiff, being authorized to receive the money and retain it in satisfaction of the cause of action, took the bill instead. What the parties to the bill were is not stated; they might be mere strangers; it might be merely a collateral security, not discharging Butters. It is not averred that Butters assented to the appropriation. The plea, not showing the transaction to be either accord or satisfaction or payment, leaves quite uncertain what its effect really is.

COLERIDGE, J. I consider that this plea is relied upon as being in some way a plea of payment: and I had some doubt whether, however inartificial, it might not be so. But a plea of payment should show what took place, so as to make it appear that the proceeding operated in some way as satisfaction. That is studiously avoided. It is said only that the bill was taken for and on account of the moneys in the declaration, and that it was appropriated and retained to and for, not "in," the liquidation and discharge. *Smith v. Ferrand*, 7 B. & C. 19, is distinguishable. It manifestly must be taken that, in that case, Kaye, who conducted the \*499] transaction for the defendant, was his authorized agent throughout, and that whatever was done was done by the defendant's assent. Here the plea states that the bill was received without the authority of the defendant.

WIGHTMAN, J. It is not necessary to give an opinion upon the general merits of the case. The plea is bad for want of an averment that the bill was taken in accord or satisfaction, or in payment. It alleges only that the bill was taken for and on account of the moneys in the declaration, and appropriated and retained to and for the liquidation and discharge. According to the authority of all the cases, a plea of accord and satisfaction should state that the thing was given and accepted in accord and satisfaction. That appears from *Sard v. Rhodes*, 1 M. & W. 153; S. C., Tyrwh. & Gr. 298, and numerous other cases.

PATTESON, J., afterwards said: I do not mean to say whether, if it had been averred that the plaintiff gave indulgence to Butters when he might have got the money from him, that might or might not have been a defence. As to that question, I wish not to be concluded by anything I have said.

Judgment for plaintiff.(a)

(a) See *Griffiths v. Owen*, 13 M. & W. 58.

\*The Mayor, Aldermen and Burgesses of the Borough of COL- [\*500  
CHESTER against BROOKE. *Wednesday, January 28th.*

(On defendant's motion.)

Reported, 7 Q. B. 339, 379.

ISAAC against DANIEL. *Thursday, January 29th.*

To an action on a bill of exchange by endorsee against drawer, defendant pleaded that the drawee accepted, and plaintiff afterwards sued drawee on the bill, and, while that suit was pending, in consideration of 2*l.*, agreed with the drawee that plaintiff should stay all further proceedings, and forbear continuing to sue, for two months, during which time plaintiff could have continued further proceedings; which agreement was without the drawer's (now defendant's) consent; and that, in pursuance of the agreement, and without the drawer's consent, plaintiff did stay all further proceedings and forbear continuing to sue the drawee. *Held*, a good plea, though it did not expressly aver that the endorsee could have obtained judgment against the drawee before the time until which he agreed to forbear.

The plaintiff in the present action traversed the agreement set out in the plea; and issue was joined. *Held*, that the drawer supported the issue on his part by merely proving the agreement, and that plaintiff was not entitled to show, in answer, that judgment could not have been obtained earlier than the time until which he had agreed to forbear.

**ASSUMPSIT.** The first and second counts were on two bills of exchange, drawn by the defendant on John Richards, endorsed by defendant to plaintiff, and not paid by Richards at maturity. The bill mentioned in the first count was for 23*l.* 5*s.* 6*d.*, dated on 15th October, 1840, and payable three months after date; that mentioned in the second count was for 30*l.*, dated 2d November, 1840, and payable three months after date.

Plea 2, (to the first count:) That John Richards, to wit, on 15th October, 1840, accepted the bill; and afterwards, and after the bill became due, to wit, on 20th January, 1841, the plaintiff, for the recovery of the amount thereof, and the damages by him sustained by the non-payment of the same, commenced an action on promises against J. R., as such acceptor, in the Court of \*the Queen's Palace at Westminster, plain- [\*50  
tiff then being holder of the bill. That afterwards, and whilst the said action was pending against J. R., and before the commencement of this suit, to wit, on 28th January, 1841, plaintiff, in consideration of 2*l.* then paid by J. R. to him, promised and agreed with J. R. that plaintiff should stay all further proceedings in the said action, and forbear continuing to sue or further suing him for the recovery of the amount of the bill and the damages, &c., namely, from the day and year last aforesaid until a certain time, to wit, for two months then next following, during which time plaintiff could and might, according to the course and practice of the said court, have continued and taken further proceedings in the action against J. R.: and the said agreement and promise were so made without the license or consent of the now defendant. That, in pursuance of the said agreement and promise, plaintiff did, for and during the said time so promised, &c.,

and without the defendant's consent or license, stay all further proceedings in the said action, and forbear continuing to sue, or further suing, J. R. for the recovery of the amount of the said debt and damages, &c. : verification. Replication : That plaintiff did not promise or agree with J. R. that plaintiff should stay all further proceedings in the said action in that plea mentioned, and forbear continuing to sue, &c., for the recovery of the amount of the bill or for the damages, &c., in manner and form, &c. : conclusion to the country. Issue thereon.

Plea 4, (to the second count :) that the said J. R., to wit, on 2d November, 1840, accepted the bill in that count mentioned ; and that afterwards, and after it \*became due, and before the commencement  
 \*502] of this suit, on 6th February, 1841, it was agreed by and between plaintiff, then being holder of the said bill, and J. R., without defendant's license or consent, that plaintiff should, for a certain consideration, to wit, 30s., then paid by J. R. to plaintiff, give J. R. time for the payment of the amount due upon said bill, and forbear to sue him for the recovery of the same, or for damages, &c., for a certain time, to wit, until the expiration of one month then next following. That, in pursuance of such agreement, J. R. then paid to plaintiff, and plaintiff then accepted and received of J. R., the said sum of 30s. on the terms aforesaid ; and plaintiff, without the license or consent of defendant, gave J. R. time for the payment of the amount of the said bill, and forebore to sue him for the recovery, &c., for the said space of a month : verification. Replication that it was not agreed by or between plaintiff and J. R. that plaintiff should give J. R. time for the payment of the amount due upon the said bill, and forbear to sue him for the recovery, &c., in manner and form, &c. : conclusion to the country. Issue thereon.

Other issues of fact were also taken, not material here.

On the trial, before Lord DENMAN, C. J., at the London sittings after last Trinity Term, the agreements stated in the second and fourth pleas respectively were proved : and it appeared that the proceedings were stayed, according to the agreement stated in the second plea, and the plaintiff forbore to sue, according to the agreement stated in the fourth plea. As to the second plea, however, it was contended that the evidence showed that the time given was not beyond that which \*would  
 \*503] have elapsed before the plaintiff could have obtained judgment in the Palace Court : and, as to the fourth plea, it was contended that the evidence showed that judgment could not have been obtained against Richards within the time during which the plaintiff was alleged to have forborne. The Lord Chief Justice was of opinion that, as the issues were framed, these answers to the pleas were of no avail ; and he directed a verdict for the defendant on these two issues, giving leave to move to enter a verdict for the plaintiff. On the other issues the plaintiff had a verdict.

In last Michaelmas Term, *Humfrey* moved to enter a verdict for the



plaintiff on these issues, or for judgment non obstante veredicto, contending that, if the pleas were to be understood as alleging a forbearance such as in effect to give indulgence to Richards, they were not proved: and that, if they could not be so understood, they were bad. He cited *Kennard v. Knott*, 4 M. & G. 474; *James v. Williams*, 13 M. & W. 828; and *Michael v. Myers*, 6 M. & G. 702. The court granted a rule nisi.(a)

*Crowder* and *Bovill* now showed cause. First, the issues on the pleas were proved, even assuming that the evidence proved that there was no indulgence in effect. No traverse was taken as to the fact of forbearance in pursuance of the agreement: whatever, therefore, the pleas may be understood to allege, except as to the fact of the agreements being made, is admitted on the record. \*Then the question arises whether the  
[\*504] pleas show a good defence. The contract to forbear is made on good consideration, and is therefore binding between the plaintiff and Richards; in which respect the case is distinguishable from *Philpot v. Briant*, 4 Bing. 717, and *Clarke v. Wilson*, 3 M. & W. 208. And it is a general principle of the law of principal and surety, (which is the relation of acceptor and drawer,) that the surety is exonerated where the creditor has, "without his assent, altered the situation in which he had a right to expect he should be placed when he gave the guaranty;" *Combe v. Woolf*, 8 Bing. 156, 161; *English v. Darley*, 2 B. & P. 61.(b) In *Price v. Edmunds*, 10 B. & C. 578, it was attempted to prove, (as the law then allowed upon the issue of non assumpsit there taken,) that time had been given to the principal debtor; but the defence failed because it did not appear that there had been any indulgence in effect. That point might have arisen here if the defendant had framed his replication so as to bring it before the jury. The 2d and 4th pleas show a forbearance, and are proved, so far as they are not admitted. The general principle, therefore, applies.

*Humfrey* and *Petersdorff*, contra. The evidence disproved the indulgence in fact. [WIGHTMAN, J. There is no issue on that.] The giving time means a giving time which will be an indulgence to the principal. [WIGHTMAN, J. But you deny only the agreement.] If \*it is to  
[\*505] be understood as securing an indulgence to Richards, it is not proved; if it be not so understood, the defendant must have judgment non obstante veredicto, as appears from *Kennard v. Knott*, and *Michael v. Myers*. *James v. Williams* shows how far a defect of this kind will prevail even on motion for judgment non obstante veredicto. This objection applies to the second plea only: it must be admitted that the fourth plea does allege a giving of time sufficient to prevent the plaintiff from recovering.

LORD DENMAN, C. J. The issues having been taken on the fact of the

(a) The rule, when drawn up, appeared to be only for entering a verdict for the plaintiff on the second and fourth pleas: but the court, on the argument, allowed the validity of the pleas to be discussed.

(b) See *Pole v. Ford*, 2 Chitt. R. 125; *Jay v. Warren*, 1 C. & P. 532.

agreements only, the pleas are clearly proved. The only question remaining is, whether the second plea be good. The agreement, as there stated, is to stay proceedings. Now, if the answer to this is meant to be that no advantage was in fact given to the acceptor, was it for the plaintiff to anticipate this answer by showing that the agreement did give an advantage, or for the defendant to show that it did not? When a plea alleges that a party stayed proceedings, we must take it as alleging that, but for the stay, they would have gone on. At first it struck me that *James v. Williams*, 13 M. & W. 828, resembled this case; for there it was held that the plea was bad, after verdict, because it did not show that the bill which the plaintiff was said to have received in satisfaction was negotiable; therefore no former *prima facie* case was made. But here I think it must be assumed, on the face of the plea, that the plaintiff had power to proceed \*506] and forbore to do so; and this makes it necessary for the defendant to show, if the fact be so, that the agreement was worthless, and that no time was in effect given.

PATTESON, J. The issues here are on the agreements only, which are proved. If the fact be that the defendant in the Palace Court, when the agreement was made, obtained nothing by it, and that the plaintiff could not have taken any step by which time would be gained, I cannot say that, on such an answer being raised by the replication, the plea would not have been met. But that is not done. We are therefore to consider the validity of the second plea. Now that states that, an action having been brought, the plaintiff therein, for money, agrees to forbear for a specified time from proceeding, and does so forbear. That could not be true unless he had power to proceed: he could not be said to forbear doing that which it was impossible for him to do. Whether the actual facts here could be specially replied, the agreement being set out in the plea, I do not know; perhaps not. I agree that, if the plea had shown an agreement, like that in *Price v. Edmunds*, 10 B. & C. 578, enabling the plaintiff, in case of default of payment, to enter up judgment as early as, by the practice of the court, judgment could have been obtained by proceeding regularly, the plea could not have been an answer. But nothing of the kind is stated. All that appears is that the plaintiff promised not to go on for two months, and did not.

WIGHTMAN, J.(a) If the holder of a bill, after he has begun to prosecute an action, agrees with the \*507] defendant to stop, and does stop, that may be pleaded by the surety in answer to an action by the holder. Here it is stated that there was an agreement to forbear further proceedings for a time named, and a forbearance accordingly. That is so pleaded: and the plaintiff takes issue on the fact of the agreement, which is fully proved by the evidence at the trial. Then it is said that there was evidence that the plaintiff did not in fact forbear, because the judgment was not postponed to a time later than that at which it would

(a) Coleridge, J., had left the court.

have been obtained without the agreement. That would be evidence on a traverse of the fact of forbearance, but is not so on a traverse of the agreement. I think, with the rest of the court, that the plea is good, because an averment of forbearance implies that the plaintiff could have gone on.

Rule discharged.

**\*The QUEEN against GREGORY. Thursday, January 29th. [\*508**

Information for libel alleged that a person unknown had committed a murder on G., and that H. had been charged with it: the information then set out the alleged libel, and charged that it imputed the murder to C. The libel, as set out, spoke of the murder of G., and stated that H. had been accused of it.

*Held*, that the inducement was proved by evidence that a person had been murdered, that H. was charged with the murder, and that, on an inquest held upon the body, witnesses called the dead person by the name of G.; and held that this last fact might properly be proved by the coroner who held the inquest, and that he might, for this purpose, use an instrument which he had drawn up as an inquisition, whether it was or was not a valid and formal inquisition.

C. was described in the information as his Serene Highness Charles Frederick Augustus William, Duke of Brunswick and Luneburg. His name was Charles Frederick Augustus William D'Este; and although he had formerly been reigning Duke of Brunswick and Luneburg, and was still commonly called by that title, he had ceased to be reigning duke de facto.

*Held*, that the description was sufficient.

INFORMATION in the Queen's Bench. The first count(a) stated that, before the publishing of the libels after set forth, a certain person, to the said coroner and attorney unknown, unlawfully, wilfully, and of his malice aforethought, one Eliza Grimwood, in the peace, &c., did kill and murder, and that one ——— Hubbard afterwards, and before the publishing, &c., was arrested on a charge of committing the said murder, but was afterwards, and before the publishing, &c., discharged from such arrest; and that Barnard Gregory, late of, &c., well knowing the premises, and wickedly and maliciously contriving and intending to injure and aggrieve his Serene Highness Charles Frederick Augustus William, Duke of Brunswick and Luneburg, and to cause it to be suspected and believed that the said C. F. A. W., Duke of B. and L., had been and was guilty of the said murder, and had been and was accessory to the commission thereof, and to bring him, the said C. F. A. W. Duke of B. and L., into infamy, &c., on 5th March, 9 Vict., at, &c., unlawfully, wickedly, and maliciously did compose, print, and publish, and cause and procure, &c., in a \*cer- [\*509  
tain newspaper then and there called The Satirist or The Censor  
of the Times, a false, scandalous, malicious, and defamatory libel, of and concerning the said C. F. A. W. Duke of B. and L., and of and concerning the said murder of the said Eliza Grimwood, and of and concerning the said ——— Hubbard, which said false, &c., libel was and is as fol-

(a) There were three other counts, which, not being material to the argument and decision, is not thought necessary to set out here.

lows, viz. : (a) “ ‘ Why,’ asks a correspondent, ‘ after the acquittal of Hubbard for the murder of Eliza Grimwood, did all inquiry cease to find out the real perpetrator of that horrid deed ? Who furnished Hubbard, on his discharge, with the means of leaving the country ?’ By the tone in which these questions are put, we are led to the inference that the writer knows more than he unfolds : we have heard hints dropped on the subject, and of parties who have not been brought forward, and who could state in whose company the unfortunate woman was last seen.” (The said B. G. thereby then and there meaning, and intending to insinuate, and cause it to be suspected and believed, that the said Eliza Grimwood was last seen in the company of the said C. F. A. W., Duke of B. and L.) “ Those hints should be put in a more tangible shape ; and the parties should be brought forward, if possible, to substantiate the charge against the villain, no matter his station in life. The subject ought not to drop ; nor can it, with the seeming clue obtained, we feel convinced, much longer sleep. For murder, though it have no tongue, will speak with most miraculous organ.” (The said B. G., in and by the said libel, then and there meaning and intending that the said C. F. A. W., Duke of B. and L., was and  
 \*510] is a person suspected of having \*committed the said murder.)  
 To the great damage, &c., of the said C. F. A. W. Duke of B. and L., to the evil example, &c., and against the peace, &c.

Plea ; Not guilty. Issue thereon.

On the trial, before Lord DENMAN, C. J., at the Middlesex sittings after last Trinity Term ; publication of the alleged libel was proved : and the counsel for the prosecution, to support the allegations in the inducement, offered in evidence an inquisition, which was produced by the coroner, purporting to be taken on the body of Eliza Grimwood, and finding a verdict of wilful murder against a person unknown. This was objected to, as being no proof, in this prosecution, of the fact of the murder. The coroner then proved that the dead body of a female was the subject of a coroner’s inquest ; and that she was called by the witnesses Eliza Grimwood : and other witnesses proved that the appearances of the body showed that the death had been occasioned by violence not accidental, and which could not have been inflicted by herself ; and that a man named Hubbard, then in custody, was charged with the murder, and was afterwards discharged. The inquisition was then offered again in evidence, but was objected to as being on paper. The Lord Chief Justice received it. It was further proved that the party said to be libelled had been the reigning Duke of Brunswick and Luneburg, but was no longer so de facto, his brother then exercising the sovereignty ; but that he was commonly called by that title ; and that his proper name was Charles Frederick William D’Este. The defendant’s counsel objected that the name was improperly described in the information ; but the Lord Chief Justice overruled the objection.

(a) Innuendoes were inserted, connecting the matter of the libel with the inducement.

Verdict: Guilty, on all the counts.

\**Cockburn* now moved for a new trial. First, the coroner's inquisition was not admissible, not being on parchment. In [\*511 1 East's Pleas of the Crown, 383, it is said: "The inquisition must be on parchment; and some have been quashed for being on paper;" and a MS. case is cited, *Rex v. Beavers*. Stat. 6 & 7 Vict. c. 83, s. 2, which enacts that inquisitions shall not be quashed, stayed or reversed on certain "technical grounds," has the words "nor (except only in cases of murder or manslaughter) for or by reason of any such inquisition not being duly sealed or written upon parchment." This inquisition was in a case of murder; and the statute, which does away with the objection in all cases except those of murder and manslaughter, shows that as to those the defect was fatal before the statute, and remains so. [Lord DENMAN, C. J. May not the inquisition be good till quashed?] The general rule is, that a record should be on parchment. Secondly, the inquisition was *res inter alios acta*. It could not, as against the defendant, be evidence of the murder. [Lord DENMAN, C. J. It showed that the party murdered went by the name.] Thirdly, the fact that the person murdered was Eliza Grimwood was not proved. The coroner proved only what passed at the inquest. Fourthly, the information misdescribes the party libelled. He is only described by a Christian name and the title of "Duke of Brunswick and Luneburg." Now it appeared that the duke *de facto* is another person, the brother of the party libelled. Even if the party were still duke, yet, as that is a foreign title, his legal addition in England is only "esquire." In 2 Inst. 667, it is said: "all dukes, marquesses, earls, viscounts, and barons of other nations, or which are not lords of the parliaments of England, are named *armigeri*, if [\*512 they be no knights; and if knights, then they are named *milites*." In 3 Hawk. P. C. 344, 7th ed., B. ii. ch. 23, s. 109, it is said: "it seems clear, that no one can be well described by the addition of a temporal dignity in Ireland or any other nation besides our own, because no such dignity can give a man a higher title here than that of esquire." For this, reference is made to *Anonymous* cases in 2 Salk. 451, and to *Rex v. Graham*, 2 Leach's Cr. C. 547. [WIGHTMAN, J., referred to *Rex v. Sulls*, 2 Leach's Cr. C. 861.] There it was proved that the prosecutrix had been commonly called Baroness Turkheim in right of an estate inherited from her father: that it had become, in fact, her name, or "Baroness" might be treated as surplusage. [COLERIDGE, J., referred to *Rex v. Norton*, Russ. & R. 510.] That decides only that an assumed proper name, if a party has been commonly called by it, may be a good description: here the question is as to an assumed title, and the known name appeared to be D'Este. The information must be construed as asserting that the party bore the English title of duke, as a bill of exchange is always considered English unless it is stated to be drawn in parts beyond the seas. The information, so construed, was disproved.

LORD DENMAN, C. J. I am of opinion that in this case there ought to be no rule. The information states what is certainly quite unnecessary, the fact of a murder having been committed on Eliza Grimwood : all that was  
 \*513] material was that the libel asserted this, and \*imputed the murder to the Duke of Brunswick. The evidence, however, proved that an inquest was held on the body of a murdered person called by the name of Eliza Grimwood. It was not necessary to show a valid inquisition : the coroner proved the fact that an inquest was held ; and he might for that purpose use the paper ; and this, coupled with the proof, given by a witness who saw the body, of the murder, and of the person murdered being called by the name, was proper and sufficient evidence. I was, however, much struck at the trial by the objection as to the addition. On the authority of Lord Coke I thought the description imperfect : and, but for *Rex v. Sulls*, I should still think the case entitled to further consideration. (His lordship then read the report of *Rex v. Sulls*.) There only a Christian name and the title of the party appeared : yet the court held this sufficient, it being shown that she was constantly known by that title. The circumstances here are similar. Though the party libelled is not a reigning prince, and another person is the prince reigning by the title in question, he is still constantly called and well known by the description in the information, so that *Rex v. Sulls* is an authority supporting the description.

PATTESON, J. There was proper evidence that an inquest was held, and that the person upon whom it was held had been murdered, and that she was called Eliza Grimwood. The inquest was proved by the coroner to have been held in fact : it was not necessary to show a valid inquisition drawn : the coroner might look, however, at what he had drawn at the  
 \*514] time. The \*other facts were proved independently by what the witnesses saw when the inquest was held. The inducement, therefore, was proved. As to the addition : it appears from *Rex v. Graham* that there would have been no valid objection if the prosecutor had been described by his proper family name, adding that he was commonly called Duke of Brunswick and Luneburg. But *Rex v. Sulls* shows that the description here given, which is that of the title by which the party is well known, is sufficient, though the title is not an English one.

COLERIDGE, J. The fact of the murder of a female, and that Hubbard had been charged with it, was proved by evidence independent of the inquisition : and the fact of the name being applied to the murdered person was proved by the coroner, who for this purpose might use what he had drawn up, though it might not be a formal inquisition. That is shown to be the murder of which the libel speaks, by the mention of Hubbard in the libel. The allegations of the inducement were therefore well proved. The remaining question is, whether the party libelled is described by the description by which he is best known. That, according to the latest authorities, is the real point. There can be no doubt that he is so de-



scribed. It is suggested that he ought to have been styled Charles Frederick Augustus William D'Este, Esquire: but really such a description would have misled half the world.

WIGHTMAN, J. The evidence at the trial, independent of the inquisition produced, proved that a female called \*Eliza Grimwood had been murdered, and that a person called Hubbard had been charged [\*515 with the murder. Then the inquisition produced, whether good or not as an inquisition, at any rate might be, as it was, used by the coroner to show that witnesses who appeared at the inquest called the murdered person Eliza Grimwood. As to the addition: I think this case cannot be distinguished from *Rex v. Sulls*, which was much considered.

Rule refused.

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In the Matter of MYRES. *Friday, January 30th.*

Under stat. 9 G. 4, c. 49, s. 4, and 55 G. 3, c. 184, sched. part I., tit. *Articles of Clerkship*, an attorney who has paid 60*l.* stamp duty on his articles in order to be admitted to the Court of Common Pleas at Lancaster must, in order to his admission to the courts at Westminster, pay an additional duty of 120*l.*

When an attorney, under such circumstances, had been admitted to this court on payment of an additional 60*l.* only, the court, on motion made within a year of such admission, but more than a year after his admission to the Court of Common Pleas at Lancaster, (see stat. 6 & 7 Vict. c. 73, ss. 29, 45,) ordered him to be struck off the roll unless he paid an additional 60*l.* in a month: though, before paying the second duty, he had been informed at the stamp office that 60*l.* was sufficient.

CROMPTON, in last Easter term, May 3d, 1845, obtained a rule calling on Miles Myres, gentleman, to show cause why he should not be struck off the roll of attorneys of this court.

The facts, as shown by the affidavits, were as follows.

By articles, dated 1st November, 1824, Mr. Myres was articulated as clerk to Mr. Cotterell, an attorney of the King's Bench, Westminster, and of the Common Pleas, Lancaster, and a solicitor in Chancery. He paid 60*l.* stamp duty; and two stamps for 30*l.* each were accordingly stamped on the articles, which were enrolled by the prothonotary of the Common Pleas, Lancaster. On 28th August, 1830, Mr. Myres was admitted \*and [\*516 enrolled an attorney of the Court of Common Pleas at Lancaster. On 4th May, 1844, he was admitted an attorney of the Court of Queen's Bench; and, just before, he paid an additional stamp duty of 60*l.*, and two stamps for 30*l.* each were accordingly stamped on the articles, in addition to the two before mentioned. It appeared that Mr. Myres, before paying the last 60*l.*, consulted one of the masters of this court, and also an officer at the stamp office, as to the sum proper to be paid by way of additional stamp duty; and that the opinion given to him by each was that 60*l.* was sufficient.

*Jervis and Petersdorff* now showed cause. This rule has been obtained

for the purpose of raising the question whether the duty to be paid on admission as an attorney of this court ought not to have been 120*l.* instead of 60*l.* But, first, if that were so, this is not the proper mode of raising the question. The proceeding should be by information: the question would then be on the record. Stat. 6 & 7 Vict. c. 73, s. 29, enacts that no person admitted and enrolled shall be struck off the roll on account of any defect in the articles, or registry, or service, or admission and enrolment, unless the application be made within twelve months from his admission and enrolment, provided the articles, &c., be without fraud. Here no fraud is pretended: no "fraud or false swearing has been practised to obtain the admission:" these are the grounds (in the nature of misconduct) mentioned in 1 Chitt. Archb. Pract. 45, (8th ed.,) which agrees with 1 Tidd's Practice, 89, (9th ed.) And, by sect. 45, Myres's admission to

\*517] this court is to be considered as dated of the \*date of his admission to the Court of Common Pleas at Lancaster, that is, 28th August, 1830. The year therefore had expired long before this rule was applied for. But, secondly, the proper stamp duty has been paid. By stat. 9 G. 4, c. 49, s. 4, the Commissioners of Stamps are authorized, "upon payment of the sum of 120*l.*, being the amount of the duty imposed by law on articles of clerkship entered into by any person in order to his admission in any of his majesty's courts at Westminster," to stamp any articles of clerkship under which a person may have been bound to serve as a clerk in order to his admission in the Courts of Great Session in Wales or the counties palatine of Chester, Lancaster, or Durham: "And thereupon the person having so served shall be capable of being admitted an attorney or solicitor in any one or more of his majesty's said courts at Westminster: Provided always, that at the time when such articles of clerkship shall be required to be stamped with the said stamp denoting the payment of the said sum of 120*l.*, such articles shall have been previously stamped with a stamp denoting the payment of the duty payable in respect of the same at the date of such articles of clerkship."

Now that has been complied with. The 120*l.* has been paid: the statute does not prescribe the time at which the payment must be: and the proviso has also been complied with, for 60*l.* of the 120*l.* were paid on the articles previously, and a stamp put on accordingly. It is never said that there must be a single payment of 120*l.* in addition to the payment on the original articles. The word "denoting" does not mean a special designation on the face of the particular stamp: there are no stamps so desig-

\*518] nated: one hundred and twenty stamps \*of 1*l.* would satisfy the statute. If this were otherwise, it would follow that an additional payment of 60*l.* would not now be sufficient: another 120*l.* must be paid, that is, 240*l.* in all; which cannot be supposed. The whole sum named in stat. 55 G. 3, c. 184, Sched. part 1, Articles of Clerkship, for articles entered into with a view of practising in the courts at Westminster, is 120*l.* Suppose a party had paid the 120*l.*, and been admitted to those

courts, and afterwards had wished to practise in a county palatine court, he would not have to pay 60*l.* more. [WIGHTMAN, J. Stat. 6 G. 2, c. 27, s. 2, enables a person admitted here to practise in any inferior court of record.] That is inapplicable to a county palatine court, which is not an inferior court. Without the aid of that statute, a person admitted here might have been admitted to the county palatine court, without a new stamp, because no statute requires one. All statutes imposing duties must be construed strictly. Thirdly, the commissioners of stamps cannot now demand a higher stamp than that which their own officers state to be the proper one. The admission has taken place with their sanction and the sanction of this court: the proper time of objecting was when the party applied for admission.

Sir *F. Thesiger*, Attorney-General, and Sir *F. Kelly*, Solicitor-General, (with whom was *Crompton*,) contra. It is not sought to throw any personal discredit on the attorney, but to raise the question, as to the proper amount of stamp, in the most convenient form. An information would not lie, because there is no debt to the crown. There is no penalty imposed for stamping with too small a sum, though it is otherwise in cases of post-dated bills of exchange or unstamped receipts, where \*there is no [519 remedy by affixing a penalty to a subsequent stamping: here the remedy is simply to annul an improper act. The party, if he has paid too little, has been improperly admitted; and he must therefore not remain on the roll. Stat. 34 G. 3, c. 14, s. 2, enacted that no one "shall be admitted" unless his indenture be duly stamped. It is true that the mistake has originated with the stamp office; but that does not render the admission valid, nor is the revenue to be prejudiced by such an error. Then, as to the proper amount. By stat. 55 G. 3, c. 184, Sched. Part. I., *Articles of Clerkship*, the stamp duty for articles with a view to admission in the courts at Westminster was 120*l.*, and, for admission in the courts of the counties palatine, 60*l.* Before stat. 7 G. 4, c. 44, it was common for clerks to be bound by articles, for admission in the palatine courts, paying a stamp duty of 60*l.*, and not to pay any thing more till they wished to be admitted here: they then paid 120*l.*, with a 5*l.* penalty.<sup>(a)</sup> Sometimes the articles were not enrolled till admission was wanted, (the usual indemnity act permitting enrolment afterwards;) and then either 120*l.* or 60*l.* was paid, according as the admission was to be to the courts of Westminster or to those of a county palatine. To prevent this practice, sect. 4 enacted that the articles should not be stamped more than six months after their date. The object of stat. 9 G. 4, c. 49, s. 4, was to remove that restriction, and to allow the payment of the additional 120*l.* at any time before admission to the courts of Westminster. There is nothing to lower the duty to 60*l.* on the new admission, though stat. 11 G. 4 & 1 W. 4, c. 70, s. 17, does make such a provision for the case of attorneys admitted to the courts of Great Sessions in Wales, because

(a) See Chitt. Stamp L. p. 50, sect. 8, 2d ed.

\*520] the abolition \*of those courts destroyed a portion of the practice of such attorneys. (The Solicitor-General was stopped by the court.)

LORD DENMAN, C. J. On the statute there is no difficulty: clearly the additional sum of 120*l.* ought to have been paid. As to the form of the application, I think it questionable whether a motion to strike this gentleman off the roll was the best way of raising the point, at any rate unless it appeared that previous attempts at an arrangement had failed. The court must exercise its discretion in such cases. No great danger to the revenue seems to exist if the course of applying to the stamp office be always pursued.

COLERIDGE, J.(a) I am of the same opinion. I do not wonder that this gentleman feels pained at the form of the motion: the objection did not occur to me at the time when the rule nisi was granted. At the same time, there is nothing necessarily discreditable in being struck off the roll: that is done, for example, at the instance of the attorney himself, when he wishes to be called to the bar. With respect to stat. 9 G. 4, c. 49, s. 4, I think it made no alteration in the amount of the duty to be paid.

WIGHTMAN, J. I am of the same opinion. But I think it would have been as well if the rule had been drawn up to strike Mr. Myres off the roll unless he would pay the 60*l.*

Rule discharged, without costs, on payment of 60*l.* in a month to the Commissioners of Stamps: otherwise absolute.

(a) Patteson, J., had left the court.

\*521] \*HUME against Lord WELLESLEY. *Friday, January 30th.*

W. executed at Brussels, in June, 1843, a warrant of attorney to confess judgment: and judgment was entered on it. In January, 1846, a rule nisi was obtained to set the warrant and judgment aside. There was nothing to show that W. authorized the application, except that the affidavit in support of the rule was made by a party who styled himself clerk to L., "attorney for the above-named defendant."

*Held*, that it ought to have appeared more expressly that the application was made on behalf of W., and the court discharged the rule, but without costs.

SIR JOHN BAYLEY, in the present term, obtained a rule calling on the plaintiff to show cause why the warrant of attorney in this case, and the judgment signed thereon, should not be set aside.

The affidavit in support of the rule had annexed to it an office copy of the warrant of attorney. It was dated 30th of June, 1843, and authorized an appearance "for me, William Pole Tylney Long Wellesley, commonly called Lord Viscount Wellesley, of Draycott House in the county of Wilts, but now residing at Brussels in the kingdom of Belgium." The attestation was as follows: "Signed, sealed, and delivered by the above-named William Pole Tylney Long Wellesley, commonly called Lord Vis

court Wellesley, in my presence, as his attorney,<sup>(a)</sup> attending at his request, and having first read and explained the same to him. W. Pyne, 30 George Street, Hanover Square." The affidavit (which verified the exhibit, stated the signing of the judgment, and identified the defendant as the present Earl of Mornington and as having become so by the death of his father about January 1845) was made by a party describing himself as "Henry Taylor, clerk to Stephen Lancaster Lucena, of No. 1 Guildhall Chambers, Basinghall Street, in the City of London, Gentleman, Attorney for the above named defendant." From the affidavit \*in answer made by the plaintiff, it appeared that the warrant of attorney had been executed at Brussels. [\*522]

*Humfrey* now showed cause. It does not appear that either Taylor or Lucena is employed by the defendant. That is necessary for such an application; *Lewis v. Lord Tankerville*, 11 M. & W. 109. The affidavit there went farther than here; for it was made, not by the attorney's clerk, but by the attorney himself, and stated that, "for many years previous to the execution of the warrant of attorney in question, and at the period at which the same bears date, and thenceforth hitherto, this deponent was, and still is, the attorney for the defendant." But Lord ABINGER said: "There should have been either an affidavit made by Lord Tankerville himself, or one stating an authority from him to make the application, so as to show that it was made by a party acting as attorney for him in the particular transaction:" and ALDERSON, B., pointed out that there was no statement that the attorney was the defendant's attorney "for this particular purpose." [COLERIDGE, J. There it appeared from the affidavits that Lord Tankerville was abroad.] That appears here by the warrant of attorney itself. Besides, the plaintiff states the execution to have taken place at Brussels. In the report of *Lewis v. The Earl of Tankerville*, 2 Dowl. N. S. 754, in Dowling, Lord ABINGER is reported to have said: "It is an established rule, that the process of the court can only be altered on the motion of the defendant himself, or of an attorney authorized by him."

Sir F. Kelly, Solicitor-General, contra. In *Lewis v. Lord Tankerville*, it must have been assumed that the \*defendant was abroad at the time of the application. The decision can be supported on no other ground. Here that cannot be assumed: indeed the presumption is the other way, as it appears that, since the execution of the warrant of attorney, the defendant has become a peer of the realm. In *Lewis v. Lord Tankerville*, reliance was placed on *Plunkett v. Buchanan*, 3 B. & C. 736, but that was an application to reverse an outlawry, for which purpose a party, before stat. 4 & 5 W. & M. c. 18, must have appeared in person, and, by sect. 3 of that act, was expressly permitted (except in cases of treason or felony) to appear "by attorney." Why should there be any such rule in the case of setting aside a warrant of attorney, more than in other proceeding where a party appears by attorney? [\*523]

(a) See stat. 1 & 2 Vict. c. 110, s. 9: *Everard v. Poppleton*, 5 Q. B. 181.

LORD DENMAN, C. J. LORD ABINGER puts his decision, according to the report in Dowling, upon the general ground that no process of the court can be altered without an application of some one authorized by the party. Even if we did not find it so laid down, it would be very strange if it were not necessary that the party should appear in some way or other, especially when we see that he was out of the country at the time when he is last shown to have acted. I cannot, however, follow the precedent in the Exchequer to the extent of giving the costs on discharging the rule upon this preliminary objection.

COLERIDGE, (a) and WIGHTMAN, Js., concurred.

Rule discharged without costs. (b)

(a) Patteson, J., had left the court.

(b) See the next case.

\*524] \*SLACK against CLIFTON. *Friday, January 30th.*

Where a judge at chambers has dismissed a summons to strike out a count, the full court will not interfere.

An affidavit sworn, for the purpose of obtaining a rule, by a party styling himself clerk to A. and B., "agents for the defendant," shows sufficiently that the application is authorized by defendant, if it does not appear that he is absent from the country.

THE plaintiff declared in assumpsit. The first count averred that, in consideration that plaintiff would provide a threshing-machine for himself, defendant and one Richard Green, to become the property of the three, the defendant promised to pay the plaintiff 6*l.* 13*s.* 4*d.* by instalments, the last payment to be made when the machine was finished, and defendant also promised that R. G. would also pay 6*l.* 13*s.* 4*d.* at the same times: the declaration then averred that the plaintiff provided the machine, which defendant and R. G. accepted: assigning for breach that defendant had not paid any instalment. The second count was indebitatus assumpsit for money by the defendant agreed to be paid, and due and payable to the plaintiff, in respect of the plaintiff having, at the request of the defendant and R. G., found and provided goods and chattels for the plaintiff, the defendant, and R. G.; for work and labour done, and materials provided, by plaintiff for defendant; and for divers goods, and undivided parts and shares of goods, sold and delivered by plaintiff to defendant; also for divers goods, &c., and undivided, &c., bargained and sold by plaintiff to defendant; for money lent by plaintiff to defendant; for money paid by plaintiff for defendant; for money received by defendant to the use of plaintiff; and on an account stated between the two; with a single breach.

The defendant took out a summons to strike out the first count, or the  
\*525] second, or so much of the second \*as related to money due from the defendant for and in respect of the plaintiff having, at the re-



quest of the defendant and R. G., found and provided goods and chattels, &c. The summons was heard before WILLIAMS, J., who dismissed it.

In this term, *Joseph Addison* obtained a rule nisi to the same effect. The affidavits in support of the rule were sworn only by a party who described himself as "John Andrew Sharp, clerk to Mrs. Scott and Tabourdin, of," &c., "agents for the above-named defendant."

Sir *John Bayley* now showed cause. First, the rule must be discharged on the principle recognised in *Hume v. Lord Wellesley*, antè, p. 521. [Lord DENMAN, C. J. No: the party here is not shown to be, or to have been, out of the country: we did not mean to lay down so general a rule as you suppose.] Secondly, the court cannot interfere where a judge at chambers has refused to act, though, when he does act, his act may be reviewed. A refusal by a judge to make an order seems indeed to have been considered as an order in *Wright v. Elliott*, 5 A. & E. 818, 822. [Lord DENMAN, C. J. That case occurred a good while ago: the view there suggested has been corrected since. WIGHTMAN, J., referred to the language of *Alderson, B.*, in *Morse v. Apperley*, 6 M. & W. 145.] (On the merits, reference was made to Reg. Gen. Hil. 4, W. 4, *General Rules and Regulations*, 6, 5 B. & Ad. iv.; *Morse v. James*, 11 M. & W. 831; *Sheppard v. Hales*, 13 L. J., N. S. Exch. 333; *Gilbert v. Hales*, 2 Dowl. & L. 227; *Weeton v. Woodcut*, 5 M. & W. 143.

\**Joseph Addison*, contra, contended that the full court could do whatever a single judge could do. [\*526]

Lord DENMAN, C. J. No. When a judge has refused to make an order, we cannot review that decision.

COLERIDGE,<sup>(a)</sup> and WIGHTMAN, Js., concurred.

Rule discharged with costs.

(a) Patteson, J., had left the court.

### The QUEEN against The Provost and College of ETON. *Friday, January 30th.*

Copyhold land was devised to A. for life, remainder to five persons, as tenants in common; A. was admitted. After his death, the five, having contracted to sell to B., severally surrendered to the use of B. in fee, which surrender was accepted by the lord. *Held*, That B., on claiming admittance, must pay five fees, and that the admittance would require five stamps.

SCHOMBERG, in last Michaelmas term, obtained a rule calling on the lords of the manor of Everdon in Northamptonshire, (the provost and college of Eton,) and their steward and deputy steward, to show cause why a mandamus should not issue, commanding them to admit Thomas Burton, as a tenant of the said manor, to a certain piece of parcel, &c., pursuant to the surrender thereof by William Morris Nicholson and Ann Winifred, his wife, Richard Claxton and Frances, his wife, Charles Morris Broad,

John Buttress, and Mary, his wife, and John Broad, on 23d November, 1844, to the use of the said T. Burton, his heirs and assigns for ever.

By the affidavit in support of the rule, the following facts appeared :

John Morris, at the date of his will and the time of his decease, was seised of the copyhold or customary lands in the rule mentioned, for an estate of inheritance, according to the custom of the manor of Everdon, \*527] by copy of court-rolls of the manor, being \*a copyhold tenant of the manor. He, according to the custom, having duly surrendered to the use of his will, made his will, dated 23d June, 1790, whereby he devised the lands in question to and to the use of his son William Morris, and his assigns for life, remainders over, which failed, and, in default of the events upon which they were to take effect, he gave and devised one full and undivided moiety or half part of the said lands to his, the devisor's, daughter Priscilla, and her assigns for life, remainder to trustees for her life to preserve contingent remainders, remainder to all and every the children, both male and female, of her body, and to the heirs of the body and bodies of all and every such children, if more than one, and the heirs of their respective bodies, to take as tenants in common, and, if Priscilla should die leaving only one child, or only one who should leave lawful issue of his or her body, then to such one child and the heirs of his or her body. As to the remainder in the other moiety, he devised it to his daughter Sarah for life, with a like devise of the remainder to her issue, as in the case of the moiety devised to Priscilla and her issue.

John Morris, the devisor, died on the 10th May, 1792, not having revoked, &c.

William Morris, the first tenant for life, was, on 24th October, 1807, duly admitted, to hold to him and his assigns for life, at the will, &c., according to the custom, &c. He died in February, 1844, having had no issue.

Priscilla Morris married William Nicholson, and died in 1825, having had issue two children only, namely, William Morris Nicholson, mentioned in the rule, and a child who died in 1810, an infant and unmarried.

\*528] Sarah Morris married Charles Broad, and died \*in 1825, having had issue six children only, namely, Frances Broad, who married Richard Claxton, the two parties mentioned in the rule, Charles Morris Broad, mentioned in the rule, Mary Broad who married John Buttress, the two parties mentioned in the rule, John Broad, mentioned in the rule, and two children who both died in 1823, having had no issue.

The said several parties mentioned in the rule having contracted for the absolute sale of the lands in fee to Thomas Burton, also mentioned in the rule, did, on 23d November, 1844, (the three female parties having been separately examined, &c., and consenting, &c.,) "severally surrender into the hands of the lords," &c., according to the custom, the lands in question, to the use of the said Thomas Burton, his heirs and assigns for ever, according to the custom.

On 24th October, 1845, Burton attended the customary court, delivered to the steward the surrender, which had been duly presented by the homage, and claimed admittance. The steward accepted and entered the surrender, but refused to admit Burton unless he would pay five fines, five fees, and for five stamps. Burton refused to pay more than one fine or fee, or for more than one stamp. The lands in question consisted of a single copyhold tenement.

In opposition to the rule, the steward deposed that he had not required five fines, but only five fees and five stamps; and that the five fines and fees would, by reason of the division, be together of the amount only of a single fine and fee for the whole.

*Hill* now showed cause. The question here is, whether five fees and five stamps, or only one of each, be payable \*for the surrender of the five parties who are tenants in common, and who convey by a single deed. Sect. 34 of stat. 48 G. 3, c. 149, enables stewards to refuse admittance until the fees and stamps are paid, sect. 33 having imposed a penalty upon them if they accept without delivering a copy of court-roll properly stamped. Therefore, the steward here, before admitting, is under the necessity of taking the opinion of the court. Now, if the testator, instead of surrendering to the use of his will, had conveyed separately to each of the tenants in common, there must have been separate admittances. In 1 Watk. Cop. 299, it is said generally: "tenants in common must be severally admitted and shall pay several fines; they having several estates: here not only being a plurality of persons but of tenants also, as the terms imply." [WIGHTMAN, J. Stat. 55 G. 3, c. 184, Schedule, Part I., *Copyhold*, imposes a duty for each admittance, where there are several on one piece of vellum, &c. The question may, therefore, depend upon the form in which the five here convey.] They hold separate estates, and, in that respect, do not resemble joint tenants. [Lord DENMAN, C. J., referred to *Attree v. Scutt*, 6 East, 476.] That case, if it is to be upheld, is conclusive in favour of the steward. It was there decided that, where heriots were claimable on a copyhold which was held by several tenants in common, each was to pay a heriot, because they required several admittances. It is true that, as to one point there ruled, namely, that after a reunion of the interests in a single party the same number of heriots would still be required, the case has been overruled in *Garland v. Jelcyll*, 2 Bing. 273: but so far as it affects the present question, the decision \*has not been impeached. Lord Coke, it is true, in the Complete Copyholder, sect. 56, p. 130, states that the grant by two tenants in common, like that by two joint tenants, shall inure as one grant, and that one fine only is due. Lord ELLENBOROUGH, in *Attree v. Scutt*, thought there was some mistake in the printing of this passage. In the note to the report of *Rex v. Mildmay*, in 2 Nevile and Manning, 798, it is shown that in the two first cited decisions, as well as that in *Holloway v. Berkeley*, 6 B. & C. 2, there was

a misapprehension of the placitum in 2 Fitz. Abr. 28, tit. *Hariott*, pl. 1, and it is argued that the heriots must always be paid for each tenement, even after a reunion. *Holloway v. Berkeley*, in effect, not only confirms *Garland v. Jekyll*, but, as to the point now before the court, recognises *Attree v. Scutt*. The surrender to the use of the will cannot alter the case: the surrender gives no estate to the surrenderee till admittance; the tenancy is still in the surrenderor; *Rex v. Dame Jane St. John Millemay*, 5 B. & Ad. 254. The equitable estate, indeed, passes by the surrender; 1 Watk. Cop. 124; but that is because the surrenderee has an equity without admittance: here the question is as to the right to admittance. Even if four of the tenants in common had conveyed to the fifth, this last could not be tenant of all till he had been severally admitted to the four estates; a release to him could not make him tenant. In *Fisher v. Wigg*, 1 Ld. Raym. 622, 631, where the question was whether the words of the surrender created a joint tenancy or a tenancy in common, Lord Holt said: "The same mischief will happen, by construing this \*531] to be a tenancy in common, viz., to make \*five copyhold estates, where otherwise there would be but one, and the lord will have five fines." In 1 Scriven, Cop. 297, (4th ed.,) it is said: "Tenants in common are altogether different from either joint tenants or coparceners; there is no survivorship between them, and as they take and transmit several estates, they cannot release to each other, and the customary heir of each must be admitted."

*Schomberg*, contra. The fallacy of the argument on the other side lies in confounding the question, whether the five estates are several inter se, with the question whether they are several so far as respects the fine. The tenant for life has been admitted: that is an admittance of the remainderman. In default of special custom, which is not suggested, nothing is due from the tenant in remainder on the death of the tenant for life.(a) The passage in Coke is allowed to be in favour of this application; and there is no ground for supposing that there has been an error in the printing. It is relied on by Mr. Serjt. Scriven, whose authority is the same way, and who says (vol. i. p. 348): "Tenants in common are to be admitted severally, and must therefore pay several fines; and as there is no survivorship between them, their respective heirs must also be admitted and pay several fines. But if tenants in common join in a surrender of the entirety of the copyhold lands, although perhaps such surrender would operate as a conveyance of distinct estates by each, yet one fine only would be due on the admission of the surrenderee, because of the reunion of the several undivided shares." [WIGHTMAN, J. When \*532] \*do they become reunited?] Perhaps it would be more correct to say that they were never divided. [COLERIDGE, J. How many heriots would there be on the deaths of the tenants in common?] Probably five, because the services are distinct. But that does not decide

(a) See 1 Scriven, Cop. 342, (4th ed.)

the question of fine. In *Attree v. Scutt*, 6 East, 476, the question arose as to the fine payable on the admittance of the owner of the several tenements: here, if the five tenants in common had claimed admittance, a fine might have been claimed from each. As to the case in 2 Fitz. Abr. 28, tit. *Harriott*, pl. 1, BAYLEY, J., in *Holloway v. Berkeley*, 6 B. & C. 15, says, it "is the case not of the creation of a tenancy in common, but of a severance of the estate into distinct parcels, and the alienation of one of those parcels."

LORD DENMAN, C. J. This is a very clear case. An admittance is required in respect of distinct interests, which need distinct stamps. The estates are not reunited till the admittance is completed.

COLERIDGE, J.(a) It is admitted that, if the five were separately admitted, they would be in of several estates, and, if so, of distinct tenements. Such admittances would operate according to the estates: if of joint tenants, as of a joint tenement. Here the tenements are several till they become reunited by the admittance of the surrenderee; and each of the five tenants in common performs a distinct act towards the surrenderee's admittance.

WIGHTMAN, J. I am of the same opinion, on the ground that the admission of the tenant for life gave \*separate estates in remainder to the tenants in common. Therefore, as in *Holloway v. Berkeley*, 6 B. & C. 2, each would have a separate tenement, and would require separate admittances and be liable to separate heriots, there having been, so far, no reunion. [\*533]

Rule discharged.

(a) Patterson, J., had left the court.

### The QUEEN against COOPER. *Friday, January 30th.*

Indictment for causing to be published in a newspaper a libel on K. The libel told a story of K., and added comments on the story, giving it a ridiculous character.

The editor of the paper deposed that defendant asked him to show K. up, and communicated the story, which the editor told to a reporter for the paper; and that this story was, substantially, what was published: that, before the publication appeared, defendant remarked on the delay: and that, after the article came out, defendant expressed approbation of it.

Held that, on this evidence, a jury might find that the defendant authorized the publication of the particular libel, notwithstanding the comments added, and although it appeared that the editor had heard the story before defendant told it to him.

The defendant was indicted for publishing, and causing and procuring to be published, in a newspaper called the *Liverpool Chronicle*, a libel on the Rev. Joshua King.

The libel, set out in the indictment, imputed that the "myrmidons" of the prosecutor had poisoned some foxes, in the country hunted over by the hounds of Sir W. M. Stanley, and had hung their bodies up by the neck; and that the tenantry of Sir W. M. Stanley, by way of retaliation, had hung up effigies of the prosecutor and his brother, with foxes' tails

appended. Some comments were added, exhibiting the prosecutor in a ludicrous light with respect to these transactions.

Plea; Not guilty. Issue thereon.

On the trial, before WIGHTMAN, J., at the Liverpool Spring assizes, 1845, the editor of the newspaper \*stated that the defendant had  
\*534] expressed a wish to him that he would "show up" the prosecutor and his brother, and had told witness the story. That the witness communicated it to a reporter for the paper; and that the libel was substantially what was so communicated. That afterwards, and before the publication, the defendant had remarked to the witness that the article had not yet appeared. That, after the article had appeared, the defendant told the witness that he had seen it, and that he liked it very much. That the witness had heard the story before the defendant told it to him.

The learned judge left it to the jury, upon this evidence, to say whether the defendant had caused the libel to be published, remarking that his approbation of it after publication was evidence to show that it was such an article as he wished to be published.

Verdict: Guilty.

Sir F. Kelly, Solicitor-General, now moved for a new trial. The language of the defendant, requesting the editor to "show up" the prosecutor, if it authorized any libellous publishing at all, cannot be construed into an authority to publish a particular libel, not then written, and cannot, therefore, fix the defendant with criminal liability for the publication. In *Rex v. Paine*, Carth. 405; S. C. 5 Mod. 163, as reported in Carthew, the defendant was indicted for composing, making, writing and publishing a libel: the jury acquitted him of the publishing, and found specially that he wrote the libel, dictated to him by a person unknown. And the court

\*535] said: "here it appears, \*that this was the first time the matter was reduced into writing, for it was written from the mouth of the author, so that the writing seems to be the very making this libel. He who dictated cannot be indicted for making this libel, because he did not write it." It is, however, true that, in Modern Reports, the language of the court appears to be different, and they are reported to have said: "if one dictate, and another write, both are guilty of making it." (a) Here, however, the evidence was that the matter published did not in fact agree with what was communicated by the defendant. The defendant only told the story: the comments, which give a ridiculous character to the whole, are added. Would the defendant have been liable if the editor had inserted an imputation of murder? It is true that, on seeing what was published, he expressed his approval of it: but this could apply only to what he had previously communicated. Where, indeed, a defendant has furnished a manuscript, from which the libel is published, and it appears that certain parts of the manuscript, as fur-

(a) The report in 5 Mod. 163, which is dated 7 W. 3, concludes with the words "et adjournatur." The report in Carthew is dated 9 W. 3.



ished, have been erased and the erased parts not published, the defendant is nevertheless liable: but, in such a case, there is this restriction, that the erased parts must not qualify the meaning of what was published. *Tarpley v. Blabey*, 2 New Ca. 437. Here the variance is produced by the publisher having added, not omitted, matter.

Lord DENMAN, C. J. I do not know that there is any case in point: but on general principles this rule must \*be refused. If a [\*536 man request another generally to write a libel, he must be answerable for any libel written in pursuance of his request: he contributes to a misdemeanor, and is therefore responsible as a principal. He takes his chance of what is to be published. Here the defendant first desires the newspaper editor to "show up" the prosecutor, and communicates to him the particulars of the story which afterwards appears in the newspaper. Having given this general authority, he meets the editor and says that the article has not appeared. That which did in fact form the foundation of the libel, and which the editor communicated to the reporter, was what the defendant communicated to the editor: and, after the publication, it was approved of by the defendant. It is observed that there were additions: but the editor said that what the defendant communicated was substantially what was published. If we held this not to be a publication by the defendant, we must go the length of exonerating a party who gives instructions for a libel in every case where the libel published departs from the instructions by a single word. It is enough that there is a substantial identity. I have no doubt that a man who employs another generally to write a libel must take his chance of what appears, though something may be added which he did not state. Here I have not the slightest doubt. There is, first, an employment; secondly, an identity of subject matter: thirdly, a complaint of the delay in the publication: fourthly, an approval: fifthly, evidence that the libel is substantially that which was communicated. A variance is out of the question, in the situation in which this party has placed himself. That which did appear is what he instigated and approved of.

\*COLERIDGE, J.(a) I agree on a very short ground. The ques- [\*537 tion is, whether there be evidence that the defendant approved of this, not a, libel. He desires the editor to "show up" the prosecutor. I agree that that direction might admit of different interpretations, as to the strength of the publication intended. But communications are made at the same time. I do not put the argument beyond this, that materials are furnished. Then complaint is made that the expected publication does not appear: that perhaps may not carry the proof much farther. But, when it does appear, the defendant gives judgment against himself by approving of it. Therefore we have both a general authority to publish, and an approval of the particular publication.

WIGHTMAN, J. The question is, whether there was evidence sufficient

(a) Patteson, J., had left the court.

to warrant the jury in finding that the defendant authorized the publication of this libel. It appeared to me proper to be left to them whether, on this evidence, they believed that this libel was what the defendant meant to be published. It would be very dangerous to allow a man to direct a libel to be published on a particular subject, and, after he has approved of what is published, to defend himself on the ground that something has been added to his original communication. The Solicitor-General's argument, that the defendant might as well be held liable for a libel imputing murder, becomes inapplicable in a case where the libel actually published is approved of by the defendant. And, as my Lord \*538] has pointed out, the libel \*is here substantially identified with the matter communicated. I think there was evidence to warrant the verdict. Rule refused.

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**CHARLES BLAKESLEY against JOSEPH SMALLWOOD and JOHN SMALLWOOD, Executors of JOHN DARLASTON BLAKESLEY.**

To assumpsit against an executor, or an account stated by him as executor, a set-off for debts due from plaintiff to testator in his lifetime may be pleaded. So held on demurrer to the replication.

The plea averred that the debt set off was equal in amount to the damages sustained by the breach of the promises. The plaintiff replied, as to 1493*l.*, parcel of the set-off, the Statute of Limitations; and further replied that plaintiff was not indebted to testator, or defendant as executor, beyond the 1493*l.*, modo et formâ; with a single conclusion to the court as to the whole replication. *Held*, on special demurrer, a bad conclusion. *Quere*, whether the replication was bad for duplicity.

**ASSUMPSIT** against the defendants as executors of John Darlaston Blakesley. The first count charged that J. D. B., in his lifetime, was indebted to plaintiff for crops of corn, &c., bargained and sold by plaintiff to, and accepted by, J. D. B., for work and labour done, and manure, &c., used, by plaintiff in preparing land for J. D. B., for goods sold and delivered by plaintiff to J. D. B., for work and labour done, and materials therefore provided, by plaintiff for J. D. B., for money lent by plaintiff to J. D. B., for money paid by plaintiff to the use of J. D. B., and for money due to plaintiff from J. D. B. on accounts stated between plaintiff and him; promise by J. D. B.

Second count: that defendants, as executors, were indebted to plaintiff on accounts stated between plaintiff and defendants as executors, promise by defendants as executors.

There was a single breach; non-payment by J. D. B. in his life, or defendants since his death. Damages 2000*l.*

\*539] \*Plea (the fourth). That plaintiff, before and at the time of the death of J. D. B., to wit, 2d April, 1842, was indebted to J. D. B. in a large sum of money, to wit, a sum equal to the amount of the damages

sustained by plaintiff by reason of the breaches of the promises in the declaration mentioned, for divers crops of corn, &c., before then bargained and sold by J. D. B. to plaintiff at his request, and by plaintiff, under and by virtue of such bargain and sale, then accepted, had, received and disposed of, and for goods, &c., before then sold and delivered by J. D. B., to plaintiff at his request, and for work then done and materials, &c., then found and provided by J. D. B. for plaintiff at his request, and for money then lent by J. D. B. to plaintiff at his request, and for money then paid by J. D. B. for the use of plaintiff and at his request, and for money then found to be due from plaintiff to J. D. B. upon divers accounts then stated between plaintiff and J. D. B., and for the use and occupation of divers messuages, &c., of J. D. B., by plaintiff, at his request and by the sufferance, &c., of J. D. B., for a long time then elapsed, had, held, used, &c.; which said sum of money, wherein plaintiff was so indebted, was to be paid by plaintiff to J. D. B. on request, and has never been paid, although plaintiff was often requested by J. D. B. to pay the same, and, at the time of the commencement of this suit and still is due and owing from plaintiff to defendants as executors as aforesaid; and against which, the said sum so due, &c., defendants, as executors as aforesaid, are ready and willing, and hereby offer, to set off and allow to plaintiff the whole amount of the damages sustained by plaintiff by reason of the breaches, &c., according to the form of the statute.

\*Replication. That the several causes of set-off in the plea mentioned, so far as the same relate to the sum of 1493*l.* 5*s.* 4*d.* [\*540 parcel thereof, did not, nor did any or either of them, accrue to J. D. B. at any time within six years next before the commencement of this suit: and plaintiff further says that he was not indebted to J. D. B., nor is he indebted to defendants as executors aforesaid, beyond the said sum of 1493*l.* 5*s.* 4*d.*, in manner and form as in the plea is alleged. Verification.

Demurrer, assigning for causes the matters afterwards insisted on. Joinder.

The case was argued in the vacation after last Trinity term.(a)

*Peacock*, for the defendants. The allegation that 1493*l.* of the set-off is barred by the statute of limitations meets the whole plea, which merely claims a set-off on account of a debt alleged to be equal to the damages due on the breach in the declaration. Whatever shows that the sum due to defendants is less than the sum due from them defeats the plea totally. What follows, also, if true, totally defeats the plea. The replication, therefore, is bad for duplicity. The sums here become material, as where a payment of a sum named is pleaded as satisfaction. [COLERIDGE, J. Suppose the first part only pleaded, and issue joined, and plaintiff to prove only 1000*l.* due, and the defendants to prove a set-off of only 1000*l.*] The plea would then be proved. [COLERIDGE, J. Yet the sum, which

(a) June 21st, 1845. Before Lord Denman, C. J., Williams, and Coleridge, Ja.

\*541] you say \*is material, would not be proved.] The proper replication would be that the plaintiff was not indebted in a sum equal to the damages. Secondly, the replication is bad for dividing the set-off; *Briscoe v. Hill*, 10 M. & W. 735. Such a method of pleading might lead to issues triable by different modes, and prevent the other side from making a single answer, as was the case in *Solomon v. Lyon*, 1 East, 370. The conclusion also is wrong; the replication ends with a direct traverse, but concludes to the court.

*Aspinall*, contra, was then called on by the court. The plea is bad. The set-off is pleaded to all the declaration: but the last count is on an account stated with the defendants, to which a set-off of a debt due from the testator is no answer. In 2 Williams's Exec. 1473, (3d ed.) it is said: "By stat. 2 Geo. 2, c. 22, s. 13, where either party sues or is sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other. But in an action by an executor in his own name to recover money due to the testator in his lifetime and received by the defendant after his death, the defendant cannot set-off a debt due to him from the testator." Reference is there made to *Tegetmeyer v. Lumley*, note (a) to *Hutchinson v. Sturges*, Willes, 264. The account stated with the executors might be in respect of a bill held by the testator, but not becoming due till after his death: in that case, there would clearly be no set-off. As to the conclusion of the replication, in *Briscoe v. Hill*, the court held that the answer to the set-off was new matter, and ought not to have con-

\*542] cluded to the country. With respect to \*the body of the replication: in *Fairthorne v. Donald*, 13 M. & W. 424, the Court of Exchequer expressed a doubt as to this mode of pleading; and PARKE, B., suggested that a general replication of the statute of limitations would be enough: but it seems more reasonable to allow the plaintiff to reply the statute to a part of a set-off, and any distinct answer, as payment, to the residue: otherwise, if the defendant prove a claim exceeding the sum barred by the statute, the plaintiff is without resource.

*Peacock*, in reply. The rule, as laid down in the passage cited from Williams on Executors, is undoubtedly correct, but does not apply to the case where an executor is defendant. An executor may sue, in that character, for a debt accruing to him, as executor, since the intestate's death: and the effect of a set-off would be to interfere with the distribution of the assets, and to give the defendant a preference. But, where the defendant is sued, as executor, on an account stated, it must be in respect of something due before the death of the testator: he cannot state an account, as executor, in respect of a debt accruing to himself: he cannot, as executor, contract a fresh debt, though he may well, as executor, have a fresh claim in respect of a debt owing to the testator, solvendum in futuro, as where a bill is given in the testator's life, but becomes due after his death. So, if the testator had been surety, and the liability

accrued after his death. Therefore the account stated cannot but be in respect of some claim as to which there might be mutual credit on account of money owing from the testator. [COLERIDGE, J. In 2 Williams's Exec. \*1389, it is said : "It seems to have been once considered, [\*543 that wherever an action was brought against an executor or administrator, on promises laid to have been made by him after the death of the testator or intestate, he was chargeable in his own right, and not in his representative capacity. The more modern authorities have, however, established, that, in several instances, the executor may be sued, *as executor*, on a promise made by him as executor, and that a declaration founded on such promise will charge the defendant no further than a declaration on a promise of the testator."(a)] That clearly shows that against such liabilities a debt due from the testator may be set off. But, if the plea be even ambiguous in this respect, the replication ought to have shown that the contract in the declaration was with the executor in his individual character. [COLERIDGE, J. The statement of account by the executor may perhaps be said to be a new consideration moving from him.] If it is merely a statement of account in respect of liabilities of the testator, (and it is difficult to conceive any other statement made by a party as executor,) there is a mutual credit shown between the testator and the plaintiff. Otherwise, it would follow that an executor, by admitting that a testator owed money in his lifetime, could make himself personally liable without assets. *Cur. adv. vult.*

Lord DENMAN, C. J., in this term, (January 22d,) delivered the judgment of the court.

This is an action brought against the defendants as \*executors [\*544 of John Darlaston Blakesley, deceased : and the declaration contains counts for goods sold, work and labour, and the money counts, with an account stated between plaintiff and the deceased. There is also a count upon an account stated between the plaintiff and the defendants as executors, upon the effect of which the question mainly arises ; and a general breach is assigned, with damages 2000*l.*

To this there is a plea, stating, in substance, that the plaintiff, before and at the time of the death of the testator, was indebted to him in a sum of money, to wit, a sum equal to the amount of the damages in the declaration, specifying the nature of the several demands, and stating them to have been payable on request, and that they were remaining unpaid to the testator, and also to the defendants as executors, at the commencement of the suit ; and the plea concludes by claiming a set-off.

The replication states that, as to 1493*l.* 5*s.* 4*d.*, parcel of the said several causes of set-off, the same did not accrue to the deceased within six years before the commencement of the suit, and that the plaintiff was not indebted to the deceased, and is not indebted to the defendants, as exe-

(a) See this applied to the case of an account stated, in *Ashby v. Ashby*, 7 B. & C. 444 ; and judgment of Holroyd, J., p. 451.

cutors as aforesaid, beyond the said sum of 1493*l.* 5*s.* 4*d.*: and this he is ready to verify.

And to this replication there is a special demurrer, to which we shall briefly advert hereafter.

But, upon the argument, the plaintiff's counsel, declining to sustain the replication, proceeded to show that the plea was bad, on general demurrer, as it was incumbent upon him to do. And the objection was that, whereas the declaration contained a count (the last) upon an account stated between the plaintiff and the defendants, a set-off for a demand or  
 \*545] demands due "from the plaintiff to the testator is inadmissible in point of law; and that therefore the plea, being bad as to one count in the declaration, was bad altogether. And, if that count had been upon an account stated between the plaintiff and the defendants in their individual capacity, there might have been weight in the objection. But the whole declaration, including the last count, is founded upon their liability *as executors*; and that last count alleges the account to have been stated with them "as executors." In no other respect (nothing else appearing) could they have been liable at all for the debts of the testator: and unless, when they are so sued, they are allowed to show that the testator was not indebted to the plaintiff, they may be without defence, and yet the plaintiff have no just demand against them at all. A plea, therefore, which shows that the testator in his lifetime had a demand against the plaintiff greater than, or equal to, the damages from the alleged breach of the promises in the declaration, and that the same was due and owing at the commencement of the suit (which this plea alleges) to the defendants "as executors," does disclose a sufficient defence, and is, we think, an answer to the action.

With respect to the replication, we are not aware, as has been observed already, that any arguments were offered to sustain it. Whether the replication be double or not, (that, however, is one of the causes of special demurrer,) we do not deem it needful to consider, as there is another cause assigned which seems to us to be sufficient. But, whether double or not, the replication obviously consists of two parts: first, that, as to the sum  
 \*546] of 1493*l.* 5*s.* 4*d.*, parcel of the causes of set-off "in the plea mentioned, the same is barred by the Statute of Limitations; and, second, that the plaintiff never was indebted to the testator, nor is indebted to the defendants as executors, beyond that sum: "and this he is ready to verify." Now, as to the latter part, that the plaintiff never was indebted, except as to part of the set-off, no appropriate issue is tendered. As to this, the conclusion ought to have been to the country: and this, being pointed out as a cause of special demurrer, must, we think, prevail: and, therefore, upon the whole, our judgment must be for the defendants.

Judgment for defendants.



## \*HILARY VACATION.(a)

[\*547]

The QUEEN against The Inhabitants of HEYOP. *Tuesday, February 3d.*

Two justices, acting in and for the county of R., made, on 13th of November, an order under stat. 9 G. 4, c. 40, for removing a lunatic from a parish to which he was chargeable, in that county, to a house licensed for the reception of lunatics in the county of S. They at the same time inquired into the lunatic's settlement, but, receiving only hearsay evidence, made no order of maintenance. On 30th November, the lunatic having been removed on the 17th to, and being still confined in, the licensed house under the order of the 13th, the same justices acting, in and for the county of R., inquired further, and ascertained the place of the lunatic's settlement to be in K., a parish in that county, and made an order whereby, after reciting the order of 13th November, they adjudicated the lunatic's settlement to be in K., and directed the overseers of K. to make certain weekly payments to the keeper of the licensed house for the care, &c., of the lunatic there. The order adjudicating the settlement did not purport or appear to have been made on an adjournment of the inquiry, on November 13th.

On appeal by K. against the order of 30th of November, the appellants stated in their notice of appeal, among other objections to the form of that order, that the order appealed against, and the order therein recited, were not respectively made by two justices of the peace acting in and for the county in which the licensed house was situate. The Sessions confirmed the order, subject to the opinion of this court on the question whether the order of 30th November was bad on any of the grounds stated in the notice of appeal.

The certiorari was issued on a motion paper handed in to the Crown Office without motion in open court; the return brought up both the order of 30th November and the order of Sessions confirming it. A rule nisi for quashing both orders was drawn up on a motion paper also handed in to the Crown Office, without motion in open court. After the case had been some weeks in the crown paper for argument, the appellants delivered additional points for argument, proposing thereby to show that the order of 30th November was bad on the face of it, for defect of jurisdiction, on grounds not submitted in the special case.

*Held*, that the appellants could not, on a rule to quash, obtained as above mentioned, go into points not reserved in the special case. But

That, the justices having been unable, on 13th November, to come to a decision on the settlement, the settlement was then one which could not be ascertained, within stat. 9 G. 4, c. 40, s. 41; and that, after the removal of the lunatic into S., the justices of R. had no jurisdiction, under sects. 38, 41, or 42, to make the order of 30th November.

On appeal against an order of two justices of the peace for the county of Radnor, dated 30th of November, 1843, adjudging the settlement of John Palfrey Wood, an insane pauper, to be in the parish of Heyop, in the said county, and ordering the overseers thereof to make certain weekly payments to the keeper of a \*licensed house for the re-  
ception of insane persons at Shrewsbury, in the county of Salop, [the quarter sessions confirmed the order, subject to the opinion of this court, on the following case.]

[\*548]

The order appealed against was in the following form :

County of Radnor, } To the overseers of the poor of the parish of Heyop,  
to wit. } in the county of Radnor. Whereas, in pursuance of  
and by an order under the hands and seals of us, the undersigned, Edward Rogers, Esquire, and the Reverend James Richard Brown, clerk,

(a) The court sat in Banco on the 2d and 3d, and on the 9th and five following days February.

two of her majesty's justices of the peace, acting in and for the said county of Radnor, bearing date the 13th day of November, 1843, one John Palfrey Wood, single man, a pauper chargeable to the parish of Knighton in the said county of Radnor, having been proved before us, on the evidence of Henry Warren, of Knighton, aforesaid, surgeon, to be insane, and inquiry having been made by us into the last legal settlement of the said J. P. W., we the said justices, by the said order, did direct the overseers of the said parish of Knighton to convey or cause to be conveyed the said J. P. W., to an asylum or a house duly licensed for the reception of insane persons, situate at Shrewsbury, in the county of Salop: Now we, the said E. Rogers and J. R. Brown, in pursuance of the statute in such case made and provided, and from satisfactory legal evidence received by us touching the legal settlement of the said J. P. W., do hereby adjudge the settlement of the said J. P. W., to be in the parish of Heyop, in the said county of Radnor; and we do hereby order the overseers of the said parish of Heyop to pay the sum of 10s. weekly, and every week, from the date of the first-mentioned order, unto

\*549] the "keeper of such licensed house or asylum," &c., "situate," &c., "for the medicine, clothing, and care of the said J. P. W., which he the said keeper is willing to accept, and which sum appears to the said justices to be a reasonable sum in that behalf.

"Given," &c., "this 30th day of November, 1843.

(Signed)

"EDWARD ROGERS. (L. S.)

"JAMES R. BROWN. (L. S.)"

The case set out the recited order of 13th November, 1843, which purported to be made by the same two justices "in and for the said county of Radnor," the certificate of the surgeon, the examination on which the original order was made, and the examinations on which the order appealed against was made. The former examination contained hearsay evidence only of a settlement acquired in Heyop by the lunatic's grandfather; the latter examinations were taken by the same justices on the 30th November, and contained direct evidence of the same settlement.

The case set out the grounds of appeal, which were various: the only one on which the judgment proceeded was the eighth:—"That the said last-mentioned order," (the order appealed against,) "and the said order therein recited, were not respectively made by two justices of the peace, acting in and for the county in which such asylum or licensed house as aforesaid is situate."

On the 17th November, the said J. P. Wood was conveyed under the said order of the preceding 13th November, to the asylum therein mentioned, at Shrewsbury, and was received into the charge of the keeper there, where the lunatic continued at the time the order of 30th November was made as aforesaid.

\*550] "On the trial of the appeal, the respondents abandoned so much of the said order of 30th November as was retrospective.

The Quarter Sessions overruled the formal objections stated in the notice of appeal, and heard the appeal upon the merits. The question for the opinion of the Court of Queen's Bench was, "whether the order appealed from is bad, informal, and insufficient for all or any of the grounds stated in the said notice. If it is so, the said order to be quashed for form."

On return to the certiorari, which was issued on a motion paper being handed into the crown office, not on motion in open court, (a) the order appealed against was sent up with the order of sessions. A rule nisi for quashing both these orders was afterwards drawn up at the crown office on a motion paper being handed in, as is usual on cases reserved at sessions, without any motion being made in court. (a) The case had been set down for argument on the first crown paper day in last Michaelmas term; on the 20th November, the appellants delivered a statement of additional points which they intended to argue, being objections to the form of the order appealed against, not comprised in the special case.

The case now coming on for argument, *E. V. Williams*, for the appellants, said that they relied on the objections as to which a statement of points had been delivered, as well as on the points reserved in the special case.

*Greaves*, who appeared in support of the order of sessions, [551] objected that such a course was not allowable. Where questions are submitted to this court by the sessions, this court will not consider any other questions; *Rex v. Guildford*, 2 Chit. Rep. 284. So in *Regina v. Costock*, 10 A. & E. 417, this court refused to notice an objection in substance, which appeared on the face of the order appealed against, that objection not having been adverted to in the notice of the ground of appeal. Formerly, the practice was to bring cases of this description before the justices of assize: this was done under the clause in the commission of the peace as to cases of difficulty. (b) Afterwards, the practice was introduced of stating a special case for the opinion of this court, and bringing it up by certiorari as part of the order of sessions; but the rule to quash was moved in court on a statement of the grounds, of which several instances occur in *Burrow's Settlement Cases*, (c) and the motion to make the rule absolute came on, and cause was shown, as

(a) This did not appear by the documents, but was admitted in the course of the argument.

(b) "Provided always, that, if a case of difficulty upon the determination of any of the premises before you or any two or more of you shall happen to arise, then let judgment in nowise be given thereon before you or any two or more of you, unless in the presence of one of our justices of the one or other bench, or of one of our justices appointed to hold the assizes in the aforesaid county." 3 Burn's Justice, 989, 29th ed. (by Bere and Chitty.) The commission in the time of James I., given by Lambard, Eirenarch, 35, 38, contains an exactly similar clause in Latin. In *Rex v. Hedingham Sible*, Bur. S. C. 112, *Rex v. Natland*, Bur. S. C. 793, and *Rex v. Justices of Westmoreland*, 2 Bott. 756, pl. 983, (8th ed.) the practice of referring points in settlement cases to the judges of assize is not made to rest on the clause in the commission of the peace.

(c) He instanced *Rex v. New Windsor*, Bur. S. C. 19; *Rex v. Bramshaw*, Bur. S. C. 98; *Rex v. St. Helen's, Abingdon*, Bur. S. C. 292.

part of the ordinary business of the court, on any day which suited counsels' convenience, after \*that appointed for showing cause by the  
 \*552] rule.(a) But, in 1775, Lord MANSFIELD made an order, "That all sessions cases be, for the future, set down in the crown paper; and that a copy of the order be left with the junior judge of the court, two days before it comes on for argument:" Bur. S. C. 806. Then it became usual, where a case had been reserved by the sessions, to draw up the rule to quash without motion in court. But, where no case was reserved by the Sessions, the rule, in term time, was invariably moved for in court, and in vacation an application was made to a judge: in *Rex v. Moor Critchell*, 2 East, 66, the objections were stated in the rule. If a party can be allowed at all to take other objections besides those reserved by the sessions, he ought to apply for the certiorari by motion in court, and mention those objections, as was done in last term in *Regina v. Hartpury*.(b) The exception contained in the New Regulations of this court,(c) that, in cases for argument in the crown paper, the parties on both sides shall deliver paper books to the judges, which shall, in all cases, (except where a special case is reserved for the opinion of the court,) contain the points intended to be argued, shows that, where a special case is reserved, the court considers that the points for argument will be sufficiently indicated thereby. If new points are to be raised in the manner now proposed, parties in the situation of the present respondents will be unable to state the additional points in their paper books. The court then called upon

\*553] \**E. V. Williams* and *Pashley* to answer this objection. Both the original order and the order of sessions are now on the files of the court in obedience to the certiorari: if that was wrongly issued, it might have been quashed on motion quia improvidè emanavit: no such application having been made, it must be taken that the orders are rightly before the court; and the rule having been drawn up for quashing both, if either of them is bad on the face, there can be no reason why the court should abstain from noticing the defect. In a case under the same statute, a similar order was quashed on motion, as not showing jurisdiction; *Regina v. Darton*, 12 A. & E. 78. In *Regina v. Costock*, 10 A. & E. 417, the objection was one that might perhaps have been cured at sessions, had it been taken there; and it does not appear that the defect in the order in *Rex v. Guildford*, 2 Chit. R. 284, might not have been so removed. [PATTESON, J. The question is, whether you are not estopped?] On facts, this court is limited to the questions asked by the sessions; but it will quash a palpably bad order. Suppose the order manifestly made by justices of the wrong county, is a party to be estopped because he has not mentioned that in his grounds of appeal? [COLERIDGE, J. He would

(a) 2 Nolan, P. L. 598, (4th ed.)

(b) In the Bail Court, 31st January. See p. 566, post.

(c) Corner's Practice of the Crown Side, &c. Appendix, 5.

be so estopped, if he had not given the six days' notice to the magistrates ] In that case the certiorari would have issued improperly, and would be quashed on a cross rule. Here the writ is properly issued, and the points have been delivered two days before the case has come on for argument : where that has been done the court never refuse to hear because it has not been done at an earlier period. The objections which it is now sought to bring \*before the court show that the order is bad on the face of it, for defect of jurisdiction : on this ground, a certiorari might [\*554 have issued without a special case ; but, as it was to issue at all events to bring up the special case, why should the court, by refusing to entertain a fatal objection on the face of the order, render it necessary to have a second certiorari after the first has been disposed of? By this practice, the court would have to confirm an order which they cannot but see to be bad ; for the sessions cannot give validity to a void order by confirming it ; *Regina v. Martin*, note (a) to *Taylor v. Clemson*, 2 Q. B. 1037. [PATTESON, J. In that case the validity of the order came properly before the court on a rule for a mandamus to enforce obedience to it. COLERIDGE, J. In *Regina v. Hartpury*, Bail Court, 31st January, 1846, I consulted the officer ; and he informed me that where the order is to be impeached on other grounds than those reserved by the sessions, the practice is to mention the points to the court, and not merely hand in the motion paper.]

PATTESON, J.(a) The practice is established, by the cases which have been cited, that an objection on the face of an order cannot be taken when a case has been reserved by the sessions which does not raise that objection, unless the rule for a certiorari has been moved for in open court, and the additional reason stated why the order should be quashed. It is very convenient, when a case is granted by the sessions, to limit the argument to the points reserved there : all parties know what those points are ; and the certiorari goes as a matter of course : and were it otherwise, parties might \*come prepared to meet one point, and then have a new one raised, which would be very inconvenient. [\*555 Nor does this rule prejudice the party obtaining the certiorari, because he can make his application for a certiorari upon the points not reserved ; and, perhaps, even if the case were disposed of, he might still come to us for a certiorari to bring up the original order on this fresh objection. But, wherever the sessions grant a case, and a certiorari issues, we will not entertain any objection not raised by the case, unless it has been mentioned to the court on moving for the writ.

WILLIAMS, J. If the objections had been taken as grounds of appeal, *non constat* that the opposite party would not have struck at once : had they been mentioned openly in court on moving for the certiorari, the respondents might have abandoned any further attempt to support the order. As it is, they come here expecting to fight on the same grounds

(a) Lord Denman, C. J., was absent.

as at sessions, and ought not now to be required to meet other points thus raised for the first time.

COLERIDGE, J. I am of the same opinion, and think that the rule rests on very good grounds. It is a fallacy to say that this court may be confirming what appears to have been done without jurisdiction. This court has no eyes for the objection: the court does not see what is not properly brought before it; a principle of law nowhere better established and observed than in sessions cases. A case from the sessions may disclose on its face a fatal defect: but still, if the justices ask no question upon it, we are content to shut our eyes to it, and to decide on the point that is  
\*556] raised for our decision. As, for example, on a question of settlement by renting a tenement, the case may disclose some fatal defects in the rating, which have been overlooked by the sessions; and, if they have reserved the case on a point as to which the settlement is, perhaps, invulnerable, we should confirm their order upon that, and take no notice of the others.

*Greaves* was then heard in support of the orders on the points reserved. [As to some objections, not adverted to by the court in their judgment, the argument is omitted.] It is contended that the order of 30th November is bad because it was made by justices of a county other than that in which the lunatic was confined at the time of making it, the orders being made in and for Radnorshire, and the licensed house being situate in Shropshire. No point is reserved as to its not appearing that there was no county lunatic asylum; *Regina v. Ellis*, 6 Q. B. 501. *Regina v. Pixley*, 4 Q. B. 711, shows that the authority of the justices under this act is not confined to places within their own county. The words of  
\*stat. 9 G. 4, c. 40, s. 38, are general: the justices before whom the lunatic is brought “shall make inquiry into the place of last legal settlement of such insane person; and it shall be lawful for them” to cause him to be conveyed to and placed in the lunatic asylum for the county, or united counties, “for which or any of which they shall act, and if no such county lunatic asylum shall have been established, then to some public hospital, or some house duly licensed for the reception of insane persons; and it shall be lawful for the said or any other two justices of the peace  
\*557] of the said county, from time to time, as occasion may require, to make order on the overseer of the parish or place wherein such last legal settlement shall be adjudged to be, for the payment of all reasonable charges of conveying such poor person to such county lunatic asylum, public hospital, or licensed house;” and for the payment of a weekly sum for maintenance in the county asylum or public hospital; “or if such poor person shall be conveyed to such licensed house, for the payment of such weekly or monthly sum to the keeper of such licensed house, for the maintenance, medicine, clothing, and care of such poor person, as such keeper shall be willing to accept, and as shall appear to the said justices to be a reasonable charge in that behalf.” There is



nothing in these words from which it can be inferred that the justices had not power to remove to a licensed house situate in a different county, or that, having done so, they had not power, from time to time, to make the orders of maintenance rendered necessary by such removal: the limit which the legislature intended to impose on the exercise of this power is shown by the proviso; "and the said last-mentioned overseer shall not remove such poor person from the said house, without an order for that purpose made by two justices of the peace for the county in which such house shall be situated, after due inquiry into the circumstances of the case, unless such person shall have been discharged as cured." This proviso clearly contemplates the legality of a removal to a licensed house in a different county, after which the power to make the other orders seems to follow by necessary inference. *Regina v. Justices of Cornwall*, 2 Dowl. & L. 775, is not inconsistent with this view: that case decided only \*that borough justices have no power to remove to the county [558] asylum. [*E. V. Williams*. The appellants will contend that, as the lunatic had been removed to a licensed house, his settlement not having been ascertained at the time of removal, the subsequent order could be made only under sect. 42, and by justices of the county in which the licensed house is situate.] Here the proceeding was under sect. 38. Sect. 42 applies only where the settlement cannot be ascertained and the removal takes place under sect. 41: here the settlement could be ascertained, and the justices at the time they made the order of removal had begun to ascertain it: they took an examination on November 13th, which did not ascertain the settlement, but showed that it could be ascertained, and put the justices on a train of inquiry which they pursued on the 30th. [PATTESON, J. It does not appear that there was any adjournment.] There is no formal statement of it; but the proceedings on the 30th were manifestly a continuation of those on the 13th: the justices could not, even on the 13th, with truth, have made an order under sect. 41, finding that the settlement could not be ascertained. The former statute regulating these proceedings, 48 G. 3, c. 96, s. 17, required the justices to make the order of maintenance "at the time" of issuing the warrant of removal. Stat. 9 G. 4, c. 40, s. 38, expressly authorizes the justices to make the orders of maintenance "from time to time." Numberless cases might be put in which justices could not adjudicate on the settlement on the same day as that on which they find the lunacy and chargeability, though they may see clearly that the settlement will be ascertained by a little more inquiry: will it be contended that during the interval they ought \*to sus- [559] pend the order for sending the lunatic to a place of proper custody? None of the previous decisions on this statute affects the present question.

*E. V. Williams* and *Pashley*, contra, were not called upon.

WILLIAMS, J.(a) We think that this is a good objection. It is argued

(a) Patteson, J., had left the court.

that, if, in the county of Radnor, there has been any inquiry at all, no matter how much or how little, into the pauper's settlement, that disqualifies the justices of the county where the asylum is situate from inquiring into the settlement, and gives jurisdiction to the justices of the county where the first inquiry is made. That, however, is an unreasonable and unnecessary interpretation. We have recourse to no violence of construction in saying that the words "cannot be ascertained," in sect. 41, reasonably mean "cannot be decided on." Then the words of sect. 42 expressly direct the further inquiry to be by justices of the county in which the asylum is situate. The reason is obvious: it may be a person in a furious and desperate state that is brought before the justices; the first duty and necessity, before ascertaining his settlement, is to confine him. The inquiry into the settlement is merely subordinate.

COLERIDGE, J. I am entirely of the same opinion. The whole authority of justices to make such an order as this is under the 38th section, or under the 41st and 42d sections, of stat. 9 G. 4, c. 40. I think the  
 \*560] \*justices, in this case, were not acting, and could not act, under the 38th section; but they did act under the 41st and 42d. The language of the 38th section is studiously framed. Upon its being made known to any justice of the peace of any county that a poor person, chargeable to any parish or place within such county, is deemed to be insane, he may order the insane person to be brought before two justices of the county, who, having called to their assistance a medical man, and being satisfied that such poor person is insane, shall make inquiry into the place of his last legal settlement. The justices did so in this case, and obtained hearsay evidence only. It is said that the examination taken on the 13th showed that the settlement might be ascertained on further inquiry, and therefore that the 41st section could not apply; but I think that the words "cannot be ascertained," in that section, must mean, not a permanent and perpetual disability to ascertain it, but only a disability to decide upon it at the time. I think the reason of the thing shows it. They may have a dangerous lunatic before them, whom it may be necessary to remove as soon as possible, not merely for confinement, but for immediate medical treatment. Their first duty, therefore, is to make an order for his removal: and, if they cannot ascertain his settlement at that time, the case falls within sect. 41. This may be inferred from the language of the 42d section, in which, instead of repeating "cannot be ascertained," the words "has not been ascertained" are used, showing that what it was at first impossible to do may afterwards come to be a thing only not done in fact. Here it appears that, after inquiry at the time of making the order of removal, the settlement was not ascertained,  
 \*561] and \*the pauper was removed: the 42d section therefore applied; and the jurisdiction was limited to the justices of the county in which the licensed house was situate. Orders quashed.(a)

(a) Reported by R. Hall, Esq. See the next two cases.

The two following cases, decided in Hilary and Trinity terms, 1847, may properly be inserted here.

**The QUEEN against The Inhabitants of ST. ANNE, WESTMINSTER.**  
(Re JONES.) *Saturday, January 16th, 1847.*

On objection, stated in grounds of appeal, that "no copy of an order of removal has been sent," appellants cannot allege that the copy sent is defective and inaccurate in not setting out the name of one of the paupers.

In an examination, after loss of an indenture of apprenticeship and sufficient search had been shown, the following evidence was given: "In or about May, 1831, the pauper was, by his own consent, his father and mother being dead, bound by indenture of apprenticeship, bearing date," &c., "which was duly stamped and executed," to serve, &c., "as an apprentice, for the term of six years then next following. I saw the indenture executed." *Held* sufficient to prove a binding as apprentice.

The court will not allow an objection to an order of removal for defects on the face to be taken on arguing the rule to quash the order of sessions on a case reserved, if the objection be not stated in the case; although the rule to quash was moved for in open court and the objection then stated, and notice of the objection was given to the respondents.

On appeal against the order of a metropolitan police magistrate for the removal of Maria, the wife of James William Jones, and her two children, from the parish of St. Pancras, Middlesex, to that of St. Anne, Westminster, the sessions confirmed the order, subject to the opinion of this court on the following case.

The case set out the examination of Edward Jones, (the uncle of the pauper's husband, James William Jones,) who stated as follows:

"The said J. W. J. is now about the age of twenty-eight years. In or about the month of May, 1831, he was by his own consent (his father and mother being \*dead) bound by indenture of apprenticeship, bearing date in or about May, 1831, which was duly stamped and executed, to serve R. M. Scott, of Dean Street, Soho Square, in the parish of St. Anne in the liberty of Westminster in the county of Middlesex, cabinet-maker, as an apprentice, for the term of six years thence next following. I attended, on behalf of my nephew, when he was so bound. I saw the said indenture executed by the parties thereto, who did severally sign, seal, and deliver the same in my presence, to which I did then set and subscribe my name as subscribing witness, attesting the execution thereof." The examinations then set out the loss of the indenture and a sufficient search for it. [\*562]

The following grounds of appeal were relied upon.

1. That the said order is bad and defective on the face thereof.
2. That the examinations on which the said order was made are wholly insufficient to support the same, and fail to disclose any such facts as show either the said Maria Jones or her supposed husband to have any settlement in our said parish of St. Anne, Westminster; and that the said examinations are wholly bad and insufficient, inasmuch as they neither

**The QUEEN against The Inhabitants of HARTPURY. Thursday,  
May 27th, 1847.**

Where an order of removal has been confirmed by the sessions, subject to a case reserved and the original order is thereupon brought up by certiorari, the court will not notice defects on the face of the order not noticed in the case: although such defects were mentioned in moving for the certiorari.

\* While in the parish of N., I received monthly relief from H." (parish:) and "I was relieved in the workhouse" of N. "by the parish of H." These statements in the examination of a pauper were held sufficient evidence of acknowledgment by parochial relief to warrant an order of removal to H.

ON appeal against an order of two justices for the removal of Sarah Ann Holder and Agnes Holder from the parish of Monmouth in the county of Monmouth, to the parish of Hartpury, in the county of Gloucester, the sessions confirmed the order, subject to the opinion of this court on the following case.

The following are all the examinations upon which the order was made, which are material to the question for the opinion of the court. The examination of Ann Morse, wife of John Morse, states: "About twenty  
\*567] years ago I married my first husband John Holder, in the parish church of Staunton, in the county of Gloucester, by banns, by whom I had three children, now living, namely: James, aged eighteen years; Sarah Ann, aged fourteen years; and Agnes, aged eleven years. My eldest son James is in service; and my daughters, Sarah Ann and Agnes, now present, who have never gained a settlement in their own right, are now chargeable to the said parish of Monmouth. During my first husband's lifetime we became chargeable to the parish of Newland, in the said county of Gloucester; and, after the death of my first husband, who died about nine years ago, I and my said three children were removed from thence to the parish of Hartpury in the said county of Gloucester, (by an order of removal,) where we were relieved: and soon after that we returned to the said parish of Newland: and while there I received monthly relief from Hartpury aforesaid, and continued to do so for six months: and I never did any act afterwards to gain a settlement elsewhere for myself or children, until I married my present husband John Morse. Soon after the commencement of the Newent Poor-Law Union in the said county of Gloucester, and while I was a widow, I was relieved in the workhouse there by the parish of Hartpury, belonging to the said union. I stayed in the Newent union workhouse, with my said three children, for about three months, at the expense of the said parish of Hartpury. I then came out of the said workhouse; and the said parish of Hartpury allowed me 4s. a week for about eight months. About seven years ago I married my present husband, John Morse, &c."

The examination of Thomas Baynton states:—"About nine years ago  
\*568] I was overseer of the parish of Newland \*in the county of Gloucester: and, while I was such overseer, I remember taking Ann Morse

(then Ann Holder, widow) and her three children, two of whom are now present, from the said parish of Newland to the said parish of Hartpury in the said county of Gloucester. I took a paper and gave it to the overseer of Hartpury, with the said pauper, and left them there."

The following, amongst others, were the grounds of appeal. 3. That the said order, and the said examinations, whereon the same was founded, are bad upon the faces thereof respectively. 4. That it appears on the faces of the said examinations that no legitimate evidence of the removal of Ann Morse, in the said examinations mentioned, and her children, was given before the justices who made the order now appealed against, the former order (referred to in the same examinations, but which we deny ever to have existed) for the removal of the said Ann Morse and her said three children not having been produced and proved before the same justices, and it not having been proved before the same justices that the said former order had been lost or destroyed, or could not be produced before the same justices. 5. That the examinations contain no legal or sufficient evidence of the making or executing of the said order in the said examinations mentioned, or of the removal or delivery of the said paupers under the said order. 7. That the statement, in the examination of Ann Morse, as to the relief received whilst the said A. M. was in our said parish, is not any evidence of any settlement in our said parish. 8. That the statement, in the same examination, as to the relief in the workhouse of the Newent Poor Law Union is not any evidence of any settlement in our said parish. 9. That the statement, in the same examination, as to the \*relief received whilst the said Ann Morse was in the parish of Newland, is wholly insufficient and uncertain as to the times when, the person from whom, and the sums in which, such relief was received. 10. That the same statement is insufficient in this, that it does not show that the said relief was given by any churchwarden or overseer, or was parochial relief, or was furnished from, or paid out of, any parochial fund whatever. [\*569

At the trial of the appeal, the appellants contended that the examinations did not disclose sufficient legal evidence of the former order of removal; which was admitted. The appellants further contended, under the 7th, 8th, 9th and 10th grounds of appeal, that the examinations did not contain any sufficient legal evidence of any acknowledgment by relief of the settlement of the said Ann Morse in the appellant parish; and objected to the respondents giving any evidence in support of such acknowledgment of settlement. The sessions held the examinations sufficient in that respect, and admitted evidence of such acknowledgment of settlement. The question for the opinion of the court was, Whether, upon the above examinations, the respondents were entitled to go into evidence of acknowledgment of a settlement of Ann Morse in the appellant parish by relief.

In Trinity term, 1846, *Greaves* obtained a rule for a certiorari to bring

\*572] \*Then, as to the objections on the face of the order: the true rule is, not that a parish is precluded from taking such objections  
 \*573] by their not being included in \*the case; but that, if it is intended to rely upon them, they must be mentioned in moving for the certiorari in open court, and the motion must not be made, as in ordinary cases, without any such specification. The respondent parish might have abandoned its case, and obtained a certiorari, relying upon the objections on the face to quash the order: how can it then be disentitled from relying on both? *Regina v. St. Anne, Westminster*, ante, p. 561, appears to have been decided on the authority of *Rex v. Guildford*, 2 Chit. Rep. 284: there, however, Lord ELLENBOROUGH only ruled that the court would not look into the order when brought up with a case from sessions, for the purpose of discovering objections: but he intimated that, if no case at all had been reserved, they would have done so. Here the objections were mentioned, and at the proper time. In *Regina v. St. Anne, Westminster*, the objection was not mentioned until the motion for a rule to quash, which was too late. (The court intimating that it was not satisfied on this point, the objections on the face of the order were not gone into.)

\*574] \*Lord DENMAN, C. J. We must decide upon Mr. Greaves's application to be heard as to objections not raised by the case on general principles. The certiorari was issued to remove proceedings had at the sessions, upon a case applied for at the sessions, and for the sole purpose of obtaining a decision of the point raised by the case. And in *Rex v. Guildford*, Lord ELLENBOROUGH appears to have felt the difficulty of travelling beyond the question asked by the sessions. To enter upon the discussion of any other would be quite inconsistent with the object of the writ. And it would moreover interpose obstacles in the way of performing the necessary business of courts, which would become perfectly intolerable. The facility with which Courts of Quarter Sessions grant cases appears to me too great already for the public convenience, and certainly not to require the addition of other methods of raising points on which cases have not been granted. When a certiorari issues to remove an order of sessions, in my opinion that order, and that only, is before us. It is true that, according to the form of the writ now in use, the original order is also required and brought up: and it is true, also, that in this

be of opinion that the examination was insufficient on the grounds stated, or either of them, the orders of removal and of sessions were to be quashed; otherwise confirmed.

*Cowling*, in support of the order of sessions, was stopped by the court.

*Crompton*, contra, cited *Regina v. High Bickington*, 3 Q. B. 790, note (a). [WILLIAMS.] How could the pauper be in the workhouse without being chargeable? She might be a servant there. [COLERIDGE, J. It appears by the case that her husband had run away and left her.] The workhouse is stated to be in Preston; but it does not follow that a person there is maintained by that township. It may be a Union workhouse. Evidence of relief by Preston ought to appear on the examination. [Lord DENMAN, C. J. So it does. You cannot say that some evidence does not appear.] (The second objection was given up.)

*Per Curiam*, (Lord DENMAN, C. J., PATTERSON, WILLIAMS, and COLERIDGE, Js.)

Orders confirmed.



case the objections imputed to the original order were very properly mentioned at the time of moving for the certiorari. But I am by no means satisfied that this practice with regard to the writ is correct. Any real objection to the original order might have been taken at an earlier stage. And I may add that the right now contended for is one which, notwithstanding the practice I have mentioned, never appears to have been supposed to exist until now. It would be possible to reject the claim in this instance on more summary grounds; for I understand that the original order is not \*before us, a copy only having been returned. But I think this is a good opportunity for expressing my opinion on the general point. [\*575]

Next, as to the objections raised in the case. No one can doubt the obvious purport of the examination. In fact we had some difficulty in ascertaining where the objection lay. In order to raise it, we really have to make presumptions against the plain truth. The pauper says she received monthly relief "from the parish." If she had said "from the parish officers," precisely the same objection would have been raised, namely, that the money might not have been parochial money.

PATTESON, J. On the first point, some doubt has prevailed respecting the practice. It has indeed been often decided that, when a case is argued, this court could not, in the course of the argument, look at any thing out of the case. But it is contended that, although this is so with respect to the proceedings at sessions, yet, the writ having brought up the original order, this court cannot fail to notice other objections apparent on the face of it. This certainly seems an inconvenient practice; and, if it exists, I think it ought to be put an end to. Whether such objection was not taken at all at the sessions, or whether it was taken and overruled, I think, on either supposition, we are bound to look at the case and nothing else. The question on the examination merely turns on the meaning of certain words, which obviously is, that the relief in question was parochial relief. None of the decided cases appears to me to touch it.

WIGHTMAN, J., concurred.

ERLE, J. I am of the same opinion on both points. I think this examination means that the relief was \*given at the expense of the parish. Such is the universal meaning of "relieved by the parish" in ordinary language. [\*576]

Order of sessions confirmed.(a)

(a) Reported by H. Merivale, Esq.

**DOE on the demise of WOODHOUSE against POWELL. *Tuesday, February 10th.***

On the trial of an ejectment, the lessor of the plaintiff claimed as assignee of a term of 999 years, which was traced from J.

A conveyance was proved, by which M. assigned the term to J., more than fifty years before the trial; and J. was shown to have had possession thenceforward; and it was proved that possession had been in parties claiming through J. down to a time within a few years of the trial.

It also appeared that, before the conveyance to J., W. had released the term to M., by a deed reciting the will of E., a party entitled to the term, under which W. and M. each asserted an interest. Probate of the will was not put in; and no proof was given of search for it. It did not appear that W. was not the party entitled to the term, in case of the intestacy of E.

*Held,*

- (1.) That a jury were not entitled to presume that probate of such will as was recited in the deed of release had been granted. And therefore that the title to the term was not traced from W. to M.
- (2.) That, upon showing cause against a rule for a new trial, after a verdict for the lessor of the plaintiff, it was not competent to him to abandon his claim of the term, and insist that, independently of the will, the jury might presume an estate in fee from the possession.

**EJECTMENT for lands in Radnorshire.**

On the trial, before ROLFE, B., at the Radnorshire Summer assizes, 1844, the lessor of the plaintiff claimed as assignee of the residue of a term for 999 years, created in the year 1730, and adduced the following evidence of his title.

1730. Indenture of lease to Christopher Weale for 999 years.

1750. Indenture, by which Catherine, stated to be widow and administratrix of the said Christopher, and another person, stated to be his assignee, assigned the residue of the term to her son, Thomas Weale.

1760. Deed poll, by which Thomas Weale assigned to his sister  
\*577] Elizabeth Weale, in trust for his mother, \*the said Catherine, for life, with remainder to the said Elizabeth Weale.

1784. Indenture between Eliza Weale, stated to be the widow of Thomas Weale, of the one part, and Alexander Mills and Mary Mills his wife, of the other part. This deed recited the last deed, and the deaths of Catherine and Thomas Weale. It then recited the death of Elizabeth Weale; and that, before her death, she duly made and published her will, dated 22d June, 1778, whereby she bequeathed the premises in question unto Edward, son of Thomas Weale, and directed the writings thereof to be delivered to him on his attaining the age of twenty-one years, provided he paid to the said Mary Mills 20*l.*; that Edward died a minor without paying the 20*l.*; that thereby (as the deed affirmed) the estate had become vested in Alexander Mills, in right of his wife Mary; and that, in order to prevent litigation on the part of the said Eliza Weale in right of her son Edward, the said Alexander Mills had agreed to give her 25*l.* in full satisfaction. The deed then contained a release of the estate by Eliza Weale to Alexander Mills.

1787. Indenture by A. Mills and his wife, assigning the residue of the term to Thomas Jones.

1804. Thomas Jones bequeathed to his granddaughter, who married one Williams.

1832. Indenture of assignment by Williams to the lessor of the plaintiff.

Possession by Thomas Jones was proved from the time of the assignment to him until his death; and by his granddaughter and her husband, afterwards, until within a few years of the present action.

On behalf of the defendants, it was objected that the lessor of the plaintiff had not made out his title, \*inasmuch as he had not produced [\*578 probate of the will of Elizabeth Weale, recited in the deed of 1784, nor accounted for the absence of such probate, nor shown that any search had been made for it. The learned baron held that it was a question for the jury whether, under the circumstances, probate was not to be presumed. The plaintiff had a verdict; and leave was given to move to enter a nonsuit.

*E. V. Williams*, in the following term, obtained a rule nisi accordingly. In last Michaelmas vacation,

*Smythies* and *W. Yardley* showed cause.(a) First, the lessor of the plaintiff had, by the possession, a good *prima facie* title in fee, even on the supposition that he failed to prove the will of Elizabeth Weale.(b) And, if the objection taken on the other side be good, Eliza Weale had no title under the will of Elizabeth, and her release is not essential to the title of A. Mills, from whom the title to the term is deduced to the lessor of the plaintiff. If Eliza Weale had such title, she has released it. If it be said that the deed of 1784 recites the existence of the term, the answer is that it also recites the will; and all the recitals must be taken together: *The Earl of Montague v. The Lord Preston*, 2 Vent. 170; *Doe dem. Twining v. Muscott*, 12 M. & W. 832; Com. Dig. *Evidence*, (B. 5.) If the fee came to Mary Mills, and her husband was seised in her right, his conveyance to Jones is voidable only, not void: *Doe dem. Collins v. Weller*, 7 T. R. 478; \**Goodright dem. Car-* [\*579 *ter v. Straphan*, 1 Cowp. 201.(c) In 1 Preston on Abstracts, p. 11, (2d ed.,) it is said: "As often as a title is for a term of years, the creation of the term should be shown from the original deed or will, if it be in existence; or if the deed creating the term be lost, the creation of the term should be stated from the recitals, as found in the more ancient deeds." Secondly, the jury were properly told that, possession being shown, they were at liberty to presume all that was necessary to the possession: if, therefore, it be necessary to trace the title to the term to the lessor of the plaintiff, that has been done. Probate may be presumed here, or letters of administration. In *Earl dem. Goodwin v. Baxter*, 2 W. Bl. 1228, it

(a) December 5th, 1845. Before Lord Denman, C. J., Williams and Coleridge, Js.

(b) The judgment of the court renders it unnecessary to give the argument on this point in detail.

(c) On this point note (9) to *Wolton v. Hele*, 2 Wms. Saund. 180, was cited on the other side.

was held that a jury were rightly recommended to presume mesne assignments, where an original lease for a term was produced, and long possession proved: which case, with others to the same effect, is cited in 3 Stark. Ev. 914, (3d ed.,) note (c). Here the learned baron did not go so far as to recommend the presumption, but left the question in the hands of the jury. In *Roe dem. Eberall v. Lowe*, 1 H. Bl. 446, surrenders and admittances to a copyhold, which are acts of a court, were presumed in favour of a long possession, though the rolls had evidently been searched and no such proceedings appeared. So admittance is presumed from the receipt of rent by the lord; *Blunt v. Clark*.<sup>(a)</sup> In *Eldridge v. Knott*, 1 Cowp. 214, the doctrine of such presumption was laid down in very broad terms. In *Goodtitle dem. Bridges v. Duke of Chandos*, 2 Burr. \*580] 1065, the court recognised \*the principle of presuming recoveries, under circumstances, though they would not there allow such a presumption from mere lapse of time.

*E. V. Williams* and *Davison*, contra.<sup>(b)</sup> It is not necessary to inquire whether the lessor of the plaintiff can show a title in fee, because at the trial his counsel claimed merely in respect of the term through the will. The only question, therefore, is whether his title to the term is made out: and that depends upon the question whether the probate of the will of Elizabeth Weale, recited in the deed of 1784, can be presumed from possession of the premises. Now possession raises a presumption on the ground, only, that it shows the non-interference of adverse parties, and therefore negatives the right of an adverse party, and so leads to the inference that whatever was necessary to the right of the party insisting on the presumption did exist. That is inapplicable to a case where there can be no adverse party. If probate of the will was not granted, that gives no other party a right to the term: it is a mere breach of a fiscal regulation. No one was interested in taking out administration in default of probate. The parties here in possession are not shown to be other than those who would have had the beneficial interest under such administration. [Lord DENMAN, C. J. In *Macdougall v. Purrier*, 2 Dow. & Cl. 135, an enrolment of a tithe award was presumed, where the usage of paying tithe was shown.] There search had been made, 2 Dow. & Cl. 149: in this case there should at any rate have been a search for the probate; or, if the will be abandoned, there should be proof of search for letters of administration. The doctrine of presumption is now \*581] \*much narrowed. It has been said that an act of parliament will be presumed: but that suggestion is strongly commented on in *Regina v. The Chapter of Exeter*, 12 A. & E. 512, 532. Probate is the act of a court of high jurisdiction: there is no analogy between such a court and a customary court: in the case of the latter, much less solemn evidence of facts is admitted, as appears from *Doe dem. Priestley v. Callo-*

(a) 2 Sid. 61, (2d ed.,) where *Froswell v. Welch*, 1 Roll. Rep. 415, is cited to this point.

(b) They were heard on February 10th, in this vacation.

way, 6 B. & C. 484: the rolls are not records, and may be contradicted; *Towers v. Moor*, 2 Vern. 98. But a probate, even in the temporal courts, is conclusive evidence of the executorship and will; *Allen v. Dundas*, 3 T. R. 125.

LORD DENMAN, C. J. We need not enter into the question of presumptions, either generally, or with respect to acts of parliament, or documents: for, under the circumstances of this case, there was no evidence of title at all, according with the claim put before the jury, unless the term created in 1730 was accounted for, and shown to be in Alexander Mills, the party who conveyed to Jones. That could not be done without inquiring for the probate of the will. The possession of Mills might be accounted for by supposing him to have held either in right of his wife as heir, or in the character of assignee of the term through the will. Probate was not necessary to account for his possession in either character. But what he conveys to Jones is the term; which renders the objection fatal; inasmuch as his right to make such a conveyance could be shown only through the act of the Ecclesiastical Court, which act is not proved, nor is any thing shown inconsistent with such act never having taken place.

\*WILLIAMS, J.(a) The cases on which Mr. *Smythies* relies as [\*582 to presumption in favour of title are collected in many places, and particularly in *Read v. Brookman*, 3 T. R. 151. The presumption in such cases rests upon possession being shown of such a nature as required, to authorize it, something like that which is presumed, whether grant, recovery, or some other step. But it rests entirely on the nature of the possession. If it be a possession such as may be otherwise accounted for, and where the possession is as likely to have taken place independently of the fact which is sought to be presumed as through it, the ground for the presumption fails. Here the possession of Jones and Mills would have equally taken place, whether probate had or had not been granted.

COLERIDGE, J. I am of the same opinion. We may get rid of the suggestion that Mills had a freehold in right of his wife, from which Jones's title was derived; for the case, on behalf of the lessor of the plaintiff, was launched as a claim to a term derived from Mills as owner of the term. Then, in tracing the title to that term, a link appears to be wanting; and the question is whether, from long possession, we can, not only presume the existence of that which is wanting, but also account for its not being proved. Where a possession is unlawful in default of a particular fact having taken place, we may perhaps presume the fact from the possession. But here the possession has all along been in the party who would have possessed had there been no probate. No one had an interest which would raise a dispute. For, had any one disputed the title to the term, the party had nothing to do but to \*take out probate in order to [\*583 defeat the rival claimant. Even if there were ground for a presumption, that can be introduced only as secondary evidence after proof

(a) Patteson, J., was absent.

of search. Nothing of the kind is done here. If this presumption could avail, I do not see why any link in a case might not be missed which it was inconvenient to supply; and leases or conveyances in fee-simple be at once presumed from the mere fact of possession. Rule absolute.

FORD against WILLIAM THOMAS DORNFORD, Executor of  
THOMAS DORNFORD. *Wednesday, February 12th.*

A discharge under the Insolvent Debtors' Act cannot be given in evidence under a replication of Nil debet to a plea of set-off, but must be specially replied.

*Seemle*, per Patteson, J., that stat. 1 & 2 Vict. c. 110, s. 91, enabling persons sued for any debt with respect to which they are entitled to the benefit of the act to plead generally that they were duly discharged according to the act by the order of adjudication, "and that such order remains in force, without pleading any other matter specially," extends to the replication to a plea setting off any such debt.

ASSUMPSIT for 35*l.* 3*s.* 4*d.*, for use and occupation of premises by the deceased, work done, and money paid, for deceased, and on an account stated between plaintiff and deceased, and an account stated between plaintiff and defendant. Pleas: 1. Non assumpsit: 2. Set-off for 100*l.*, money lent and advanced and money paid by the deceased in his lifetime to and for plaintiff, and on an account stated between deceased and plaintiff. Replication: 1. To the first plea, similiter: 2. To the second plea, that plaintiff was not indebted to T. Dornford at the time of his decease, nor was he, the said plaintiff, at the commencement of this suit, nor is he now, indebted to defendant as executor as aforesaid, in manner and form, &c.

On the trial, before Lord DENMAN, C. J., at the London sittings after Hilary Term, 1845, the plaintiff proposed to prove, under his replication to the plea of set-off, that he had been discharged under the Insolvent \*584] Debtors' Act, and that his debt to T. Dornford had been regularly inserted in the schedule. The Lord Chief Justice received the evidence. Verdict for the plaintiff, with leave reserved to the defendant to move to set it aside and enter a nonsuit.

In Easter Term following, *E. V. Williams* obtained a rule nisi accordingly, citing *Bircham v. Creighton*, 10 Bingh. 11.

*Crowder* and *Petersdorff* now showed cause. By stat. 1 & 2 Vict. c. 110, s. 91, it is provided that, if any suit or action be brought against any person entitled to the benefit of the act, for any debt with respect to which he has so become entitled, it shall be lawful for such person to plead generally that he was duly discharged, and that the order remains in force, without pleading any other matter specially. There is, therefore, an express provision made as to the plea: but it does not extend to the replication, where the discharge is replied to a set-off. It is therefore necessary to consider whether such discharge is an answer under the replication Nil debet; which, though no longer admissible as a plea since



the New Rules, is still good as a replication; *Chapple v. Durston*, 1 C. & J. 1; *Jackson v. Robinson*, 8 Dowl. P. C. 622.(a) This replication denies, not that there ever was a debt, but that any debt now exists. And, where the debtor has been discharged as insolvent, not only is the remedy taken away, but the debt itself is gone. It would be otherwise of a discharge under the bankrupt act; for there, although the debtor is discharged, the debt remains, and may be revived by a subsequent promise. This distinguishes the case, also, from the defence under the statute of limitations, which, in *Chapple v. Durston*, was replied \*to a plea [\*585 of set-off; for that statute does not destroy the debt, but the remedy only. The point, therefore, is not simply one of pleading, but raises the question whether in point of law the right to set off a debt is extinguished by the debtor's discharge under the Insolvent Debtors' Act: if it be so, this replication must be good. But it is plain that a set-off cannot be made available unless of a debt for which there is a right of action; such must be the meaning of the expression "mutual debts" in the statute of set-off, 2 G. 2, c. 22, s. 13; debts which can be mutually enforced. [PATTESON, J., referred to *Solomons v. Lyon*, 1 East, 370.] That was a case where the replication was held bad on the ground that part of it referred matter of record to the cognisance of a jury; but it may be questioned if in any case a special form of replication has been held necessary where the debt set off was on simple contract. *Brown v. Daubeny*, 4 Dowl. P. C. 585; *Jackson v. Robinson*, and *Harvey v. Hoffman*, 2 Dowl. P. C., N. S. 683, show that payment may be proved under this replication, though it could not under the form *nunquam indebitatus*.

*E. V. Williams*, contra. The replication denies the existence of the debt, and in so doing contravenes the authorities. The judgment in *Chapple v. Durston*, 1 C. & J. 1, was not founded on the peculiarity of the defence of the Statute of Limitations: the court there adopts the doctrine, that the same principles must be applied to the replication which would have governed a plea before the New Rules; as to which principles *Bircham v. Creighton*, 10 Bing. 11, is an express authority. (He was stopped by the court.)

\*Lord DENMAN, C. J. I certainly thought at the trial that this [\*586 reply might have been given in evidence under the general form Nil debet: but I am now convinced that the view I then took was not correct; and *Chapple v. Durston* appears to me an authority to that effect, whether the statutory provision of 1 & 2 Vict. c. 110, s. 91, applies to the plea only, or to the replication also.

PATTESON, J. Although the replication is not expressly mentioned in stat. 1 & 2 Vict. c. 110, s. 91, I think the word "plead" in that statute probably includes replication. If this be so, the hardship and difficulty of pleading the proceedings under the Insolvent Debtors' Act at full length are obviated, and the statutory form may be adopted. But, with reference

(a) See *Stockbridge v. Sussams*, 3 Q. B. 239.

to the point immediately before us, the case of *Chapple v. Durston* appears to put the plea of set-off on the same footing as a new declaration: and thus *Bircham v. Creighton*, showing that a discharge under the Insolvent Debtors' Act could not have been proved before the New Rules under *Nunquam indebitatus* or *Nil debet*, becomes a case in point.

WILLIAMS, J. The fallacy of the argument for the plaintiff consisted in the position that the debt is extinguished by the discharge: that position failing, it becomes clear that such discharge could not be given in evidence under the replication *Nil debet*. It is a juster view that, in analogy to the case of the Statute of Limitations, the remedy only is extinguished.

COLERIDGE, J., concurred.

Rule absolute.(a)

(a) Reported by H. Merivale, Esq.

\*587] \*The QUEEN against The MIDLAND Railway Company.  
Friday, February 13th.

A coroner's inquisition touching the death of V., found, as to the cause of death, that "a certain locomotive steam-engine numbered 48, with a certain tender attached thereto, and worked therewith, and also with divers, to wit, three carriages, used for the conveyance of passengers for hire, on a certain railroad or tram-way called 'The Midland Railways,' there situate, and which said carriages respectively were then and there attached and fastened together, and to the said tender, and were then and there propelled by the said locomotive steam-engine, and which said locomotive steam-engine, tender and carriages were then and there moving and travelling along the said railroad or tram-way towards the town and county of the town of Nottingham: And the jurors aforesaid, upon their oaths aforesaid, do further say that, whilst and during the time that the same locomotive," &c., averring a collision with a train in which V. was travelling, and ascribing his death to the collision, but not so as to be intelligible without the earlier part of the finding.

The court quashed the inquisition, holding that the words "and which said locomotive engine, tender and carriages" could not be rejected as surplusage for the purpose of rendering the previous words sensible.

A CORONER's inquisition, touching the death of William Varnells, was brought up by certiorari.

The inquisition purported to be taken in the parish of Lenton, in the county of Nottingham, on the 22d November, 8 Vict., 1844, and at adjournments. The point on which the court decided arose on the statement of the cause of death, which was as follows.

"That heretofore, to wit, on," &c., "at," &c., "a certain locomotive steam-engine numbered 48, with a certain tender attached thereto, and worked therewith, and also with divers, to wit, three, carriages used for the conveyance of passengers for hire, on a certain railroad or tram-way called 'The Midland Railways,' (sic) there situate, and which said carriages respectively were then and there attached and fastened together, and to the said tender, and were then and there propelled by the said locomotive steam-engine, and which said locomotive steam-engine, tender and carriages were then and there moving and travelling along the said railroad or tram-way towards the town and county of the town of

\*588] Nottingham: And the jurors aforesaid, upon their oaths aforesaid, do further say that, whilst and during the time that the same loco-

motive steam-engine, tender and carriages were so moving and travelling along the said railroad or tram-way, a certain other locomotive steam-engine, numbered 25, with a certain other tender attached thereto, and worked therewith, and propelled thereby, with divers, to wit, five, other carriages, used for the conveyance of passengers for hire, and then and there respectively fastened together, and attached and fastened to the said last-mentioned tender, and in one of which said last-mentioned carriages, to wit, the carriage nearest but one to the said last-mentioned tender, the said William Varnells was then and there a passenger, and was then and there riding in, and being carried and conveyed thereby, were then and there moving and travelling upon and along the said railroad or tram-way in a direction from the said town and county of the town of Nottingham, towards the said first-mentioned locomotive steam-engine, tender and carriages; and that the said first-mentioned locomotive steam-engine, tender and carriages, and the said secondly above-mentioned locomotive steam-engine, tender and carriages, being then and there so respectively moving and travelling upon and along the said railroad or tram-way in opposite and different directions, then and there accidentally, casually and by misfortune, came into violent and forcible contact and collision;" &c. The inquisition then went on to ascribe the death of Varnells to injuries caused by the collision; and found a verdict of accidental death, levying a deodand (a) on both engines and all the carriages, as respectively moving to the death; and found them to be the property [\*589 of the Midland Railway Company.

Several objections to the inquisition were taken: but it is sufficient to state the following.(b)

7. "That it does not appear by the said inquisition with sufficient certainty that the carriage in which the said W. V. was travelling collided or came into contact with any other carriage, tender or locomotive engine; and it is not alleged in or by the said inquisition in what manner or by what means the collision or coming into contact of the other carriages, tenders and locomotive engines mentioned in the said inquisition caused either the last-mentioned carriages, locomotive engines and tenders, or the carriage in which the said William Varnells was travelling, to move to the death of the said W. V."

In last Michaelmas term,(c)

*Waddington* showed cause.(d) The accident sufficiently appears, from the inquisition, to have been occasioned by the collision of the train in

(a) See, since, stat. 9 & 10 Vict. c. 62.

(b) The case was argued on other points, which it is not thought necessary to notice.

(c) November 8th, 1845. Before Lord Denman, C. J., Williams, Coleridge, and Wightman, Js.

(d) A question arose as to the proper order of proceeding. The court permitted two counsel to be heard in support of the rule, and also allowed the counsel opposing it to reply; but said that this must not be taken as a precedent. Reference was made to *Regina v. Brownlow*, 11 A. & E. 119; *Regina v. The Great Western Railway Company*, 3 Q. B. 333; *Regina v. West*, 1 Q. B. 826.

which the deceased was travelling with the locomotive engine and train first mentioned, unless the inquisition is rendered insensible by the error in the language. The words "a certain locomotive steam-engine numbered 48" are \*followed by no verb, as the sentence is now framed.

\*590] But, by rejecting the unnecessary words, "and which said locomotive steam-engine, tender and carriages," the sentence will give the meaning which it was evidently intended to convey. In 1 Stark. Cr. Pl. 247, (2d ed.,) it is said: "It frequently happens that an averment" [which] "is faulty, because it is either inconsistent with the fact, or is repugnant to other parts of the indictment, or is in itself insensible and absurd, will not be fatal. For, according to the salutary and equitable maxim, '*utile per inutile non vitiatur*;' and the general rule is, that if the defective averment might, without detriment to the indictment, have been *wholly* omitted, it shall be considered as surplusage, and disregarded." In *Rex v. Morris*, 1 Leach, C. C. 109, (4th ed.,) an indictment charged "that Francis Morris" received stolen goods, "he, the said Thomas Morris," knowing them to be stolen: the words "the said Thomas Morris" were rejected as surplusage, though they in fact introduced a repugnancy. Lord ELLENBOROUGH's language, in *Rex v. Stevens & Agnew*, 5 East, 244, 260, goes quite as far as is required for this case: and he refers to 2 Hal. Pl. C. 193. Further, the objection is met by stat. 6 & 7 Vict. c. 83, s. 2, which enacts that no inquisition shall be quashed for want of certain words, "nor for the omission or insertion of any other words or expressions of mere form or surplusage."

*M. D. Hill* and *K. Macaulay*, contra. The statute removes no technical defects, except those specified: and the court will not be astute in supporting a proceeding of this kind. The words in question are not surplusage: if every thing is to be called so, the \*omission of which

\*591] would make an incorrect record correct, what limit can be assigned to the alteration of the sense of the instrument? Here the passage which it is proposed to alter is a necessary part of the description of the manner in which the death occurred. In *Rex v. Morris* the indictment, after the words were rejected, contained all the material averments. The words rejected were insensible, because they purported to refer to something when there was nothing to which they could refer: but here the words "which said locomotive," &c., distinctly and consistently refer to the words preceding, "a certain locomotive," &c. By the proposed omission, the nominative case, which, as the sentence now stands, is connected with no verb, would commence a distinct and new assertion. But, if the whole clause is omitted, the inquisition becomes unintelligible.

*Waddington*, in reply. No new averment is introduced: the part which follows the clause in question sufficiently shows that the clause itself was intended to aver that which it would aver if the proposed omission were made.

*Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court.

This inquisition, after a statement to which many objections have been taken, alleges that "a certain locomotive steam-engine numbered 48, with a certain tender attached thereto, and worked therewith, and also with divers, to wit, three, carriages used for the conveyance of passengers for hire, on a certain railroad or \*tram-way called 'The Midland Railways' there situate, and which said carriages respectively were then and there attached and fastened together, and to the said tender, and were then and there propelled by the said locomotive steam-engine, and which said locomotive steam-engine, tender and carriages were then and there moving and travelling along the said railroad or tram-way towards the town and county of the town of Nottingham:" and then, with nothing intervening, comes a distinct allegation, "And the jurors aforesaid, upon their oaths aforesaid," and so on. We think, without entering into any other objection, that this will not do. We were desired to reject certain words as surplusage, and consider the inquisition as if they were not contained in it, as in *Rex v. Morris*. But there are no words, in this inquisition, by rejecting which that sentence can be made intelligible. It is a nominative case without a verb. The subject is described; but nothing is predicated respecting it. We cannot supply by conjecture something more which the jury intended to find, but have not found. Possibly the omitted or suppressed part might have shown facts disproving the conclusion arrived at. Inquisition quashed.

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\*PAGE against HATCHETT.

[\*593]

Declaration for obstructing a wharf of which plaintiff was possessed: plea, traversing such possession: issue thereon.

Plaintiff having proved sixty years general user, defendant proved that, thirty years before the trial, the parties through whom plaintiff claimed had accepted a lease of adjoining land, containing a grant of the use of the land in question, as the same had been theretofore used by the lessees as a sawpit and for laying timber.

Held, that the jury might nevertheless, from the general user, infer that plaintiff was possessed of the land absolutely at the time referred to in the pleadings.

THIS cause was tried before WIGHTMAN, J., at the Middlesex sittings after last Michaelmas term. A verdict was found for the plaintiff, with liberty to move to enter a verdict for the defendant.

In last term, (a) Sir F. Kelly, Solicitor-General, moved to enter the verdict accordingly, or for a new trial. The nature of the action, and the point made, sufficiently appear from the judgment. *Cur. adv. vult.*

LORD DENMAN, C. J., in this vacation, (February 12th,) delivered the judgment of the court.

This was an action on the case; and the declaration contained two counts. The first stated that the plaintiff was possessed of a wharf, and that the defendant obstructed the access to it. The second was in trover.

(a) January 13th, 1846. Before Lord Denman, C. J., Patteson, Coleridge, and Wightman, J.

The defendant pleaded to the first count that the plaintiff was not possessed of the wharf as alleged: but the jury found that he was.

The plaintiff, in support of his allegation of possession of the wharf, proved user by those under whom he claimed, and himself, for more than sixty years. The evidence of user was indeed so strong that the Solicitor-General admitted, both at the trial and in moving for the rule, that the plaintiff had made out a *prima facie* case which would entitle him to a  
 \*594] verdict upon the issue \*of Not possessed, unless rebutted; but he offered evidence, which he said was conclusive against the plaintiff and left him no case for the jury. He put in the last lease from the Cadogan family to those under whom plaintiff claimed. It was a lease, in 1816, of certain premises in the neighbourhood, together with the use of the stairs and the piece of waste ground, the wharf in question, as the same had theretofore been used by the lessees as a sawpit and for the laying timber upon. This lease, it was said, gave a mere easement, and disproved the plaintiff's assertion that he was possessed of the wharf, and entitled the defendant to a verdict upon the plea of Not possessed.

We are, however, of opinion that upon this issue the demise of the use of the close for a particular purpose was not inconsistent with the plaintiff's assertion of possession generally, nor conclusive against the *prima facie* case of the plaintiff from user for all purposes to which the lessees chose to apply it.

This was the only point made as to the first count. With respect to the count in trover, several points were made. With respect to them we think a rule should be granted, unless the plaintiff will consent to abandon that count. If he will not, then a rule must be granted as to the point raised with respect to that count.

Rule refused as to the issue on Not possessed.

The verdict on the second count was afterwards abandoned.

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\*595]      \*BARROW and Another against ARNAUD.

Stat. 9 G. 4, c. 60, repealing certain acts which laid duties on foreign corn imported for consumption in the United Kingdom, imposed new duties, to be graduated according to the average price of British corn, which average was to be certified by the comptroller of customs, who, for that purpose, was to strike a six weeks' average on the prices for the last week, as ascertained from returns for that week transmitted to him, and the averages certified by him in the five preceding weeks.

The Customs' Act, 3 & 4 W. 4, c. 56, in the table of duties inwards, has the words "Corn. See 9 G. 4, c. 60."

Stat. 5 & 6 Vict. c. 14, repeals stat. 9 G. 4, c. 60, (except as to the repeal of former acts,) and enacts that there shall be levied and paid, from and after the passing of stat. 5 & 6 Vict. c. 14, the duties on corn specified in the table annexed. The table graduates the duties according to the average price "made up and published in the manner required by law." Sect. 28 enacts that the comptroller shall strike a six weeks' average from the prices transmitted to him for the last week and his last five averages, and shall on every Thursday transmit a certificate of the average so struck to the collectors at the ports; and the duties to be paid shall be regulated by the last of such certificates received by the collector. Sect.



It authorizes the comptroller, till there shall have been a sufficient number of weekly returns under the act, to use his own weekly averages published before the act passed.

*Held*, by the Court of Exchequer Chamber, reversing the judgment of the Court of Q. B.:

That stat. 9 G. 4, c. 60, was not kept alive by stat. 3 & 4 W. 4, c. 56, for the purpose of striking the first average under stat. 5 & 6 Vict. c. 14, but was absolutely repealed by stat. 5 & 6 Vict. c. 14; and that, therefore, no duties were payable upon corn imported between the passing of stat. 5 & 6 Vict. c. 14, and receipt by the collector of the comptroller's first certificate under the last-mentioned statute.

*Held*, also, by the Court of Exchequer Chamber:

That the collector was liable, under stat. 3 & 4 W. 4, c. 52, s. 18, to an action on the case by the importer for not signing the bill of entry for such corn until he received a certain sum which he claimed as duty. And

That, the corn having been delivered up to the importer on his paying, under protest, the sum claimed as duty, the measure of damages was the amount so paid, together with the loss sustained by the detention of the corn, taking into account a fall of prices which had occurred between the refusal to sign and the delivering up of the corn.

CASE. The first count charged that, whereas, heretofore, and after the passing of an act, &c., (5 & 6 Vict.(a) c. 14,) entitled "An act to amend the laws for the importation of corn," and before the Thursday next ensuing the date of the passing of the said act, to wit, 3d May, 1842, a large cargo or quantity of goods, that is to say a cargo of wheat, to wit, 88½ quarters of wheat, of great value, to wit, 400*l.*, belonging to plaintiffs, of the growth and produce of a foreign country, to wit, of Spain, was, by plaintiffs, lawfully imported into the \*United Kingdom for the purpose of consumption, that is to say, into the port of Liverpool, in the county of Lancaster, in a certain ship or vessel, called The David and John; which said cargo was duly reported, according to the provisions of the statute in that case, &c., to wit, on the day and year last aforesaid: That afterwards, and after the passing of the first-mentioned act, and before any certificate of the aggregate average prices of British corn, made by the authority or in pursuance of the first-mentioned act, had been received by the collector or other officer of customs at the port of Liverpool, to wit, on 5th May, &c., plaintiffs, in order to enter the said goods and cargo inwards, such cargo and goods being then free of duty, did, to wit, in Liverpool, &c., deliver to defendant, then being collector of the customs at and for the said port of Liverpool, a bill of the entry of such cargo and goods, expressing and containing therein the matters and things by the statute in that case made and provided in that behalf required: Averment that no duties were then and there by law payable upon the said goods and cargo mentioned in such entry: And plaintiffs then and there also delivered to defendant such and so many duplicates, to wit, two of the said bill of entry, expressing and containing therein all such matters and things in manner and form as by law, &c., and by the said statute, &c., and by defendant and the comptroller of the said port, were in that behalf required: and plaintiffs then and there, before any such certificate had been received as aforesaid, required defendant, as such collector, to sign the said bill of entry, in order that the same, being signed by defendant and the said comptroller, might be duly transmitted to the landing waiter, and might

\*597] be the \*warrant to him for the landing and delivering of such goods and cargo: And it then became and was the duty (a) of defendant, as such collector, to sign the bill of entry accordingly; of all which premises defendant then and there had notice: Yet defendant, not regarding his duty in that behalf, did not nor would sign the same, but then and there wrongfully neglected and refused so to do: Whereby plaintiffs were, and have been, hindered from landing, and obtaining and procuring the delivery and possession of, the said goods and cargo, and were put to great trouble, charges, and expenses, to wit, 100*l.*, in and about the endeavouring to procure the landing, delivery, and possession, &c., and plaintiffs were thereby also hindered and prevented from selling and disposing of the said goods and cargo to great advantage, as they otherwise might and would have done, and thereby were deprived of divers great gains, and sustained great loss, to wit, to the amount of 150*l.*; and thereby also plaintiffs were put to great trouble, loss, and charges, in and about the warehousing of the said goods and cargo, and in paying a large \*598] sum of money, to wit, 100*l.*, in the name of duties \*for the same, in order to procure delivery and possession thereof; and were otherwise by the premises greatly damnified.

There were five other counts, which, as was agreed on both sides, raised the same points as the first, in respect of wheat imported in five other vessels respectively.

Plea: Not guilty. Issue thereon.

At the Liverpool Spring assizes, 1843, a special verdict was found: which, as to the issue joined on the first count, was substantially as follows:

That defendant, before and up to 28th April, 1842, and from thence hitherto, was and continued to be, and still is, the collector of customs for the port of Liverpool. That on Thursday, 28th April, 1842, the comptroller of corn returns, appointed and acting under and in pursuance of stat. 9 G. 4, c. 60, did, in pursuance of that act, (b) transmit to defendant, as collector of the port of Liverpool, a certificate of the aggregate average prices of British corn; and in such certificate the aggregate average price of wheat was stated to be 59*s.* 1*d.* per quarter; and such certificate was received by defendant on Friday, 29th April, 1842. (c) That, upon

(a) Stat. 5 & 6 Vict. c. 14, s. 2, enacts that the duties specified in the act "shall be raised, levied, collected, and paid in such and the same manner in all respects as the several duties of customs mentioned and enumerated in the table of duties of customs inwards annexed to an act," &c., 3 & 4 W. 4, c. 56. Sect. 4 of that statute enacts, that the duties "shall be ascertained, raised, levied, collected, paid, and recovered, and allowed, and applied or appropriated, under the provisions of an act," &c., 3 & 4 W. 4, c. 52, the 18th section of which prescribes the course to be taken for entering goods inwards, (as stated in the declaration to have been pursued by the plaintiffs,) and enacts that the bill of entry, "being duly signed by the collector and comptroller, and transmitted to the landing waiter, shall be the warrant to him for the landing or delivering of such goods." As to the collector's duty under this section, and the remedy for breach of it, reference was made to *Barry v. Arnaud*, 10 A. & E. 646.

(b) See sect. 30.

(c) The day of the royal assent to stat. 5 & 6 Vict. c. 14.

Tuesday, 3d May, 1842, the plaintiffs lawfully imported from Spain into the port of Liverpool, (for the purpose of consumption,) in a British vessel called *The David and John*, which arrived in the said port upon that day, a cargo of wheat of the growth and produce of Spain, consisting of 88½ quarters, which said vessel and cargo were properly reported. That, on Thursday, 5th May, 1842, the comptroller of corn returns, \*ap- [\*599 pointed and acting under and in pursuance of the act of 5 & 6 Vict. c. 14, transmitted to defendant, as collector of the port of Liverpool, a certificate of the aggregate average prices of British corn; and in such last-mentioned certificate the aggregate average price of wheat was stated to be 59s. 3d.; and such last-mentioned certificate was received by defendant on Friday, 6th May, 1842. That on Thursday, 5th May, 1842, before any certificate of the aggregate average prices of British corn, made by authority or in pursuance of the last-mentioned act, had been received by defendant or any officer of customs at the port of Liverpool, and while the said wheat of plaintiffs was on board the said vessel, the plaintiffs tendered and delivered to defendant a bill of entry, containing therein the matters and things required by statute, with proper duplicates, as by law and by the defendant and the comptroller of the said port required, for his signature, in order to enter the said wheat inwards, and in order to procure the signature of defendant, and to transmit the said bill of entry, when signed by defendant and the comptroller of the said port, to the landing waiter, to be the warrant for landing and delivering the wheat out of the vessel, and at the same time required defendant to sign the same. That defendant refused to sign the said bill of entry unless certain duties, that is to say, 13s. for every quarter,(a) were paid upon the said wheat. That, in consequence of such refusal, the plaintiffs were unable to procure delivery and possession of the wheat.

\*There were also findings as to the parcels of wheat which were respectively the subjects of the five other counts, raising the same point.(b) [\*600

The verdict further found that, on 16th June, 1842, notice of action was given to defendant by plaintiffs, and the requisitions of stat. 3 & 4 W. 4, c. 53, s. 103, &c., in this respect, complied with.

The jurors then found that, if it should seem to the court that the defendant was guilty on the first count, he was so guilty.

The verdict further found that, afterwards, upon 17th August, 1842, the plaintiffs paid to defendant, under protest, in the name of duties, in order to procure delivery and possession of the wheat, and without which

(a) The duty payable, according to the table annexed to stat. 5 & 6 Vict. c. 14, "whenever the average price of wheat, made up and published in the manner required by law, shall be for every quarter" "59s. and under 60s." Under stat. 9 G. 4, c. 60, the duty at such price would be higher.

(b) A part of the wheat was found to have been imported before, but had been warehoused at Liverpool without payment of duty: and the demand was made, on 5th May, to enter inwards. The counts of the declaration varied the statement accordingly.

plaintiffs were unable to procure the signature of defendant to a bill of entry for the said wheat, the sum of 35*l.* 11*s.*, and did also pay, in respect of the same wheat, the sum of 3*l.* 18*s.* 9*d.* for warehouse rent and insurance from fire, from 5th May to 17th August. That the value of the wheat on 17th August was much less than the value of the same wheat on the said 5th May; and that such diminution of value was by reason of a fall of prices in the markets for wheat. And thereupon the jurors assessed the damages of the plaintiffs, by reason of the grievances in the first count mentioned, over and above their costs and charges, &c., to 99*l.* 2*s.* 2*d.*, unless it should seem to the court that, in assessing the said damages, they ought not to have respect to the damage sustained by the plaintiffs \*601] by reason \*of the said diminution of value of the said wheat in consequence of the said fall of prices in the markets for wheat: and, in that case, they assessed the damages of the plaintiffs by reason of the grievances in the said first count mentioned to 39*l.* 9*s.* 9*d.*, over and above, &c.

The jurors then found that, if it should seem to the court that the defendant was not guilty on the first count, he was not guilty.

The question was left to the court in the same way on the five other counts, with assessments of damages on both scales.

The case was argued in the court of Queen's Bench, in Trinity term, 1844,(a) by *Erle* for the plaintiffs, and Sir *F. Thesiger*, Solicitor-General, for the defendant. *Cur. adv. vult.*

Lord DENMAN, C. J., in the following vacation, (June 11th, 1844,) delivered the judgment of the court.

This was an action on the case, brought by a person who had imported wheat from Spain, against the collector of custom duties at Liverpool, for refusing to sign a bill of entry without being first paid a sum claimed as duty, when none was due: whereby plaintiff was deprived of the opportunity of selling it, and parted with his money, &c.

A special verdict was found, setting forth facts which would entitle him to recover unless the defendant was justified in detaining the wheat; in other words, unless the duty claimed was payable.

\*602] \*The defendant was bound to show the affirmative, and rested his case on stat. 9 G. 4, c. 60, which was said to be kept alive by stat. 5 & 6 Vict. c. 14, by a particular enactment for this purpose, though repealed by it in general terms.

The object of the latter was, to impose a different set of duties from those payable under the former: and, in order to build, as it were, from a new foundation, it begins by distinctly enacting "That the said act shall be and the same is hereby repealed."(b)

(a) Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js. The nature of the case, and the arguments, will sufficiently appear from the judgments of this court and the Court of Exchequer Chamber.

(b) Except so far as it repeals former acts: sect. 1.

In the second section, it enacts the new duties, providing "That from and after the passing of this act there shall be levied and paid to her majesty, upon all corn," &c., "entered for home consumption in the United Kingdom from parts beyond the seas, the several duties specified and set forth in the table annexed to this act; and that the said duties shall be raised, levied, collected, and paid in such and the same manner in all respects as the several duties of customs mentioned and enumerated in the table" of "an act passed," &c., 3 & 4 W. 4, c. 56, "and in the acts amending the same, and not otherwise." Now this table is an alphabetical list of articles, with the sums to be levied for duty placed against them, and opposite to the word "corn" we find only "See 9 G. 4, c. 60." And, on referring to that act, the method of imposing the duty is laid down, (a) by means of averages, calculated every Thursday, on a return to the comptroller of prices from the market towns there enumerated. (b)

The present law received the royal assent on Friday, \*the 29th of April. The plaintiff's wheat was imported on the 3d May, in the interval between the expiration of stat. 9 G. 4, c. 60, by its repeal, and the first day when calculations could be made under stat. 5 & 6 Vict. c. 14. The plaintiff, therefore, contends that the law provides no means for obtaining any data from which the duty can be estimated, and that none can therefore be payable: he contends, also, in general terms, that the duty itself had, by the repeal of the act imposing it, become incapable of collection, and that that act could not be made available for any purposes, on the principle laid down by Lord TENTERDEN in *Surtees v. Ellison*, 9 B. & C. 750, 752: "It has been long established, that, when an act of parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed. That is the general rule; and we must not destroy that, by indulging in conjectures as to the intention of the legislature." On this principle we acted in *Regina v. Mawgan*, 8 A. & E. 496; and indeed it is not to be questioned. [\*603]

On the other hand it was pressed, on behalf of the defendant, that a new duty is imposed and made payable from and after the passing of that act: that the repeal of the former, though it prevents the operation of the old scale, cannot undo the actual calculation of averages made on the very day before, and lawfully made under the former act; that nothing prohibits the crown from resorting to it for the purpose of laying the tax on corn then imported. The defendant argued that the language employed in the table appeared well adapted to this intermediate state of things, as well as to the permanent regulation, and that there was no other \*construction which could reasonably account for that language. "Table of duties to which this act refers. If imported from any foreign country: Wheat—Whenever the average price of wheat, made up and published in the manner required by law, shall be for every quarter" "59s. and under 60s.—13s" The words are not "in the" [\*604]

(a) Sect. 30.

(b) Sect. 8.

manner required by this act," but "by law;" and the averages had been duly taken by law under the former act on Thursday, the 28th of April.

Upon the whole, we think the defendant's construction the most reasonable. That the legislature intended to impose, and did impose, a duty during the five days, is not a conjecture in which we indulge, but a truth which admits of no question; and, as that intention may be effected, and the duty obtained, by a literal interpretation of the words used, we are bound to give those words their natural meaning, and effect to the enactment.

Judgment for defendant.

## IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

BARROW against ARNAUD.

For syllabus, see p. 595, ante.

The plaintiffs brought error in the Exchequer Chamber.

The case was argued in last Michaelmas vacation, (a) by Sir *F. Kelly*, Solicitor-General, for the \*plaintiffs in error, and *W. F. Pollock*,  
 \*605] for the defendant in error. *Cur. adv. vult.*

TINDAL, C. J., in this vacation, (February 3d,) delivered the judgment of the court.

This was an action upon the case, brought by the present plaintiffs in error, who were also the plaintiffs below, against the defendant, then being the collector of the customs of the port of Liverpool, for wrongfully neglecting and refusing to sign a bill of entry of a cargo of corn belonging to the plaintiffs, when presented to him for such purpose, in order that the said cargo might be landed, the same being then free of duty; whereby the plaintiffs were put to great expense in warehousing the same, and lost the profits they might have acquired in selling and disposing of the same, &c. The defendant pleaded the general issue, Not guilty. And at the trial the jury found a special verdict, in which the several facts were stated which raised the points of law we are about to consider.

The court below gave their judgment for the defendant below; and thereupon this writ of error was brought.

Two questions were raised before us on this record. The first, whether, in respect of corn, the produce of foreign countries, imported into the United Kingdom for consumption, *any duty* was payable at the time when the bills of entry, mentioned in the special verdict, were presented to the defendant for his signature. Secondly, if no duty was payable, what was the amount of damages the plaintiffs are entitled to recover.

\*606] By stat 9 G. 4, c. 60, the earlier statutes, imposing \*a duty on foreign corn, were repealed; and certain new duties were im-

(a) November 26th, 1845. Before Tindal, C. J., Colman, Maule, and Cresswell, Js, and Alderson, Roife, and Platt, B.



posed, to be ascertained in manner pointed out by that act. By stat. 5 & 6 Vict. c. 14, s. 1, stat. 9 G. 4, c. 60, was absolutely repealed, and therefore became thenceforth as if it had never existed. An attempt indeed was made, in argument, to show that it was kept alive by stat. 3 & 4 W. 4, c. 56, "An act for granting duties of customs," because, in the table of duties thereto annexed, the word "corn" is found entered thus: "Corn, See 9 G. 4, c. 60." But the meaning of that entry is made quite clear by the second section of that statute, which enacts "that in lieu and instead of all other duties of customs (except the duties upon corn, grain, meal, or flour,) there shall be raised," &c., "the several duties of customs" "set forth in figures in the tables to this act annexed:" and the act does not impose any duty whatever on corn. The mention of corn in the table is not for the purpose of making it thereby liable to duty, but to explain that the duty on corn was imposed and regulated by stat. 9 G. 4, c. 60. And, when the latter statute was repealed, the duty was at an end.

The repealing statute received the royal assent on the 29th April; and, by the second section of it, new duties were imposed in these terms. "Be it therefore enacted, that from and after the passing of this act there shall be levied and paid to her majesty, upon all corn, grain," &c., "entered for home consumption in the United Kingdom from parts beyond the seas, the several duties specified and set forth in the table annexed to this act; and that the said duties shall be raised, levied, collected, and paid in such and the same manner in all respects, as the several duties of customs mentioned and enumerated in the table of duties of customs inwards annexed to" stat. 3 & 4 W. 3, c. 56. [\*607]

By the table of duties annexed to stat. 5 & 6 Vict. c. 14, the duties on wheat are made to depend upon "the average price of wheat, made up and published in the manner required by law." Was there then, at the time in question, any average price of wheat, made up and published in the manner required by law. That depends upon the 28th section of the act, which enacts that the comptroller of corn returns shall every week, from all the returns made to him in the preceding week, (a) ascertain the average prices of different kinds of British corn; that he shall add such sums to the sums ascertained in like manner during the five preceding weeks, and so ascertain the aggregate average prices of the six weeks: "and the sum thereby given shall be deemed and taken to be the aggregate average price of each such sort of British corn respectively, for the purpose of regulating and ascertaining the rate and amount of the said duties." The comptroller is then to publish such aggregate average in the Gazette, and, on Thursday in each week, transmit a certificate of such aggregate average prices to the collector or other chief officer of customs at each of the several ports of the United Kingdom, "and the rate and amount of the duties to be paid under the provisions of this act

(a) See sect. 26.

shall from time to time be regulated and governed at each of the ports of the United Kingdom respectively by the aggregate average prices of British corn at the time of the entry for home consumption of any corn," &c., "chargeable with any such duty, as such aggregate average prices shall \*608] appear and be stated in the last of such \*certificates as aforesaid, which shall have been received as aforesaid by the collector or other chief officer of customs at such port." Now the certificates mentioned in this section are certificates to be made, and published, and transmitted, after the passing of this act. No allusion is made to any certificates theretofore made by any authority of parliament, or otherwise: and until some certificate, made in pursuance of the act, had been received by the collector of customs at Liverpool, there was no mode of ascertaining any amount of duty that was to be paid on the importation of foreign corn; and consequently none could be created. (a) For, according to the expression of Lord Chief Justice VAUGHAN in *Sheppard v. Gosnold*, Vaughan, 159, 166, "A duty impossible to be known can be no duty; for civilly, what cannot be known to be, is as that which is not." An argument in favour of the defendant was founded on sect. 30 of the act in question, whereby it was provided "that until a sufficient number of weekly returns shall have been received by the said comptroller of corn returns under this act to afford such aggregate average prices of British corn as aforesaid," (that is, an average the aggregate of the averages of six several weeks,) "the weekly average of prices of British corn published by him immediately before the passing of this act shall by him be used and referred to in making such calculations as aforesaid, in such and the same manner as \*609] if the same had been made up and taken under and in \*pursuance of this act." And it was contended that this enabled the collector of customs to ascertain the amount of duty to be levied under this act by what had been done under stat. 9 G. 4, c. 60. But it seems clear that this section only authorizes the comptroller of corn returns to resort to the old weekly averages for the purpose of making out the new aggregate averages, and that the collector of customs can look to nothing but what is done under the existing act. There is no provision that, until he has received a certificate of the aggregate averages under this act, he may resort to any other document for the purpose of ascertaining the amount of duties. We, therefore, feel bound to say that, during the short interval between the passing of this act and the receipt of the first certificate of aggregate averages afterwards transmitted by the comptroller of corn returns, no duty was payable on foreign corn, and that the defendant was bound to sign the bills of entry presented to him by the plaintiff.

(a) The Solicitor-General pointed out that in stat. 7 & 8 G. 4, c. 58, s. 26, there was a proviso apparently introduced to guard against the difficulty arising in the present case; but that there was no corresponding provision in stat. 5 & 6 Vict. c. 14, nor in the intervening act of 9 G. 4, c. 60. *Kay v. Goodwin*, 6 Bing. 576, was referred to. See *Roadknight v. Green*, 9 M. & W. 652.

It remains for us to consider what is the proper measure of damages to be recovered. The plaintiffs are of course entitled to receive back the amount paid by them to obtain possession of the wheat: and we think that they are also entitled to receive the amount of the loss sustained by them by reason of the fall in the price of wheat.<sup>(a)</sup> Where a contract to deliver goods at a certain price is broken, the proper measure of damages in general is the difference between the contract price and the market price of such goods at the time when the contract is broken, because the purchaser, having the money in his hands, may go into the market and \*buy. So, if a contract to accept and pay for goods is broken, [\*610 the same rule may be properly applied; for the seller may take his goods into the market and obtain the current price for them. But the rule in such cases is inapplicable to the present. The plaintiffs might not have the money to pay the duties demanded: and the defendant, having improperly withheld from them the means of obtaining possession of their goods, should answer for all the loss resulting from his act.

For these reasons, the judgment of the court below must be reversed, and judgment given for the plaintiffs for the amount of damages found by the special verdict to have been sustained by the plaintiffs, calculated upon the principle above mentioned.

Judgment of the Court of Queen's Bench reversed; and judgment to be entered for damages on the higher scale.

(a) On this point, *Gainsford v. Carroll*, 2 B. & C. 624, was cited.

### TYLER against SHINTON. *Friday, February 13th.*

To an action of debt upon simple contract, defendant pleaded in bar, under stat. 5 & 6 Vict. c. 116, s. 10, an order for protection. The plea stated only that the action was for a debt contracted before the date of filing defendant's petition for protection from process as after mentioned; that before the commencement of the suit, he, under and by virtue of and according to the directions of the statute, presented his petition for protection from process to the Birmingham District Court of Bankruptcy; that such petition was duly presented; and that afterwards, and before the commencement, &c., a final order for protection and distribution was made by a commissioner duly authorized.

*Held*, on special demurrer, that the plea did not show enough to bring it within the requisites of the statute.

DEBT for goods sold and delivered, and on an account stated.

Plea 2. That this action is brought for and in respect of a debt contracted before the date of filing the defendant's "petition for protection from process, \*as hereinafter mentioned, and not otherwise; and the defendant further saith that heretofore, and before the commence- [\*611 ment of this suit, to wit, on," &c., "he the said defendant, under and by virtue of and according to the directions and provisions of a certain statute made," &c., (5 & 6 Vict. c. 116, "for the Relief of Insolvent Debtors,") "presented his petition for protection from process to

the Birmingham District Court of Bankruptcy in the county of Warwick : and the defendant further says that such petition was duly presented, and that afterwards, and before the commencement of this suit, to wit, on," &c., "a final order for protection and distribution was made by a commissioner duly authorized. And this," &c. (verification.)

Special demurrer, assigning for cause that the plea is bad as a plea at common law, inasmuch as it does not state that the required notices were given or inserted previous to the presenting of the petition; nor that the said petition was in the form, or contained the requisites, by the statutes in that behalf prescribed; nor that the necessary proceedings were had and taken thereupon; or what those proceedings were; nor that the debts of the defendant were not, or were found not to have been, contracted by reason of any of the matters and things in the said statute mentioned, which, if found, would have disentitled the defendant to the protection of the said statute: and also that the said plea is bad as a plea under and given by the said statute, inasmuch as it does not follow the language of the said statute in that behalf; also for that it is not stated or alleged, nor doth it appear in or by the said plea, that the said final order in that plea mentioned was in order for the protection of the defendant; or that it was made \*in the matter of the said petition in  
 \*612] that plea alleged to have been presented; or that it in any way concerned or related to the defendant or the debt in the said declaration mentioned, and for the recovery whereof this action is brought; also for that it does not, as it ought to do, supposing it to be a plea under the said statute, conclude to the country.

*Bramwell*, for the plaintiff. Sect. 10 of stat. 5 & 6 Vict. c. 116, enacts "that if any suit or action is brought against any petitioner for or in respect of any debt contracted before the date of filing his petition, it shall be a sufficient plea in bar of the said suit or action that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorized." Now, admitting that the plea, if it followed this section, might have been sufficient, however general it was, the plea does not satisfy the requisites in the section. The allegation as to the final order may perhaps be supported by the words of the section, if the preceding part of the plea be good. But that is not so. The word "such," in sect. 10, means such a petition as is described in sect. 1, where numerous requisites are prescribed. But the word "such" in the plea refers merely to "his petition for protection from process," the words in the earlier part. That does not show that such a petition as the statute describes has been presented. (He was then stopped by the court.)

*Gray*, contra. This plea is authorized by the decision in *Cook v. Henson*, 1 C. B. 908. [Lord DENMAN, C. J. The plea \*there named  
 \*613] the commissioner as a commissioner of her majesty's Court of Bankruptcy. But how can we know judicially of the existence of the Bir-

mingham District Court of Bankruptcy?] Sect. 1 speaks of the commissioner for country districts. In *Cook v. Henson* it was not alleged that the commissioner there named was a London commissioner. The name is not given here; but that cannot be necessary; and, at any rate, the objection is not assigned as special cause of demurrer. In *Cook v. Henson*, nothing was shown pointing out the nature of the particular jurisdiction. [PATTESON, J. How can the plaintiff reply? If he traverses the order, he admits the jurisdiction: if he alleges that the defendant did not reside in the Birmingham district, he admits all other matters pleaded as to the discharge. If this general plea be allowable, a general replication should be so too.] That objection might have been taken in *Cook v. Henson*. The plaintiff might reply by a cumulative traverse, even if he could not reply *De injuriâ*. [PATTESON, J. As to a reply *De injuriâ*, the defence arises upon matter occurring since the cause of action accrued.]

*Bramwell*, in reply. In *Cook v. Henson* the objection was not to want of jurisdiction, but to a supposed defect in the statement of facts, assuming the jurisdiction to be shown. Here the whole proceeding might be *coram non judice*; for it does not appear that the defendant has resided twelve calendar months in the commissioner's district, which, by sect. 1, is essential to the jurisdiction. This objection is fatal, even if the court can take judicial notice of the district. The \*plaintiff cannot tra- [\*614  
verse what is not in the plea: but how could he take the objection by way of confession and avoidance? [COLERIDGE, J. I see that the want of allegation of residence was assigned as special ground of demurrer in *Cook v. Henson*.] It does not appear to have been insisted upon. The Court of Bankruptcy has jurisdiction wherever a district court has not been established by order of council: it might therefore be said, in *Cook v. Henson*, that jurisdiction appeared *primâ facie*: here the opposite presumption would be made. Besides, there are two debts in the declaration; but the plea, though pleaded to the whole declaration, speaks only of a debt. [Gray. The declaration treats the debt as the aggregate of both the claims. PATTESON, J. The plea does not state that the order was for the protection of the defendant, nor that it was made in the matter of the petition.]

LORD DENMAN, C. J. Certainly *Cook v. Henson* goes the full length which the statute allows: we are now called on to go farther still: but we cannot do so.

PATTESON, J. In *Cook v. Henson* it was alleged that the order "was made in the matter of the said petition."

WILLIAMS and COLERIDGE, Js., concurred.

Judgment for plaintiff.

## \*615] \*MILNER against WILLIAM JORDAN.

To trespass for breaking plaintiff's close, &c., defendant pleaded that plaintiff was tenant from year to year of the locus in quo to B., the owner of the freehold, subject to a stipulation that B., or his on-coming tenant, at any time after the 1st January preceding a 6th April when plaintiff should have received notice to quit on such 6th April, should have liberty to enter and plough; that B. gave plaintiff half a year's notice to quit on a 6th April, and afterwards "agreed to let" to defendant, and defendant "agreed to take" of B., the land, and hold the same to defendant as tenant from year to year after the expiration of plaintiff's tenancy; and defendant "thereupon became and was the on-coming tenant of B.," on the expiration of plaintiff's tenancy: and that defendant afterwards entered, between the 1st January and the said 6th April, to plough, &c. (justifying).

*Held*, on demurrer to the replication, a good plea in bar; for that the allegation that defendant became B.'s on-coming tenant was sufficient on general demurrer, assuming that the plea showed no demise from B. to defendant, and that the contract pleaded required a written instrument (as to which assumptions *quære*).

The plaintiff, admitting that the locus in quo was B.'s freehold, replied *De injuriâ absque residuo causæ*.

*Held* bad, on special demurrer, inasmuch as defendant in his plea derived an authority from plaintiff.

TRESPASS for breaking and entering plaintiff's close, and treading down the grass, &c. (with other grievances not pleaded to in the plea after mentioned.)

Plea (3d), as to the grievances above mentioned. That, before and at the said times when, &c., the close in which, &c., was a certain close of arable land, parcel of a certain farm containing divers closes of arable, &c., together with a certain farm-house, barn and other buildings, which said farm and premises, before and at the times when, &c., were the farm-house, &c., soil and freehold of one Alexander William Robert Bosville; and the said farm and premises, before and at the times when, &c., were held, occupied and enjoyed by plaintiff as tenant thereof to A. W. R. B., to wit, as tenant thereof from year to year, upon and subject to certain terms, &c., and, amongst others, the following: that is, that the said A. W. R. B., or his or their on-coming tenant, at any time after the 1st January preceding the 6th day of April when the plaintiff should have  
 \*616] given or received \*notice to quit the said farm and premises on such last-mentioned 6th day of April, should have full liberty to enter upon, and to plough, &c., all the arable land of the said farm, except the fallows or turnip fallows of the preceding summer: Averment that, whilst plaintiff so held, occupied, &c., the said farm and premises, as such tenant to A. W. R. B., and before any of the said times when, &c., and more than half a year before the expiration of the then current year of the said tenancy, to wit, on 5th October, 1844, A. W. R. B. gave notice to plaintiff that he, plaintiff, should quit the farm and premises on a certain day, to wit, 6th April, 1845, the said last-mentioned day being the day of the expiration of the then current year of the tenancy of plaintiff: That afterwards, and before any of the said times when, &c., to wit, on 1st January, 1845, A. W. R. B. agreed to let to defendant, and defendant then agreed to take, the said farm and premises, to hold the same to defendant



as tenant thereof, to wit, as tenant from year to year, from and after the expiration of the said tenancy of plaintiff, that is to say from the said 6th April; and defendant thereupon became, and was, the on-coming tenant of the said A. W. R. B. of the said farm and premises, on the expiration of the said tenancy of plaintiff: and that the close in which, &c., at the times when, &c., was not, nor was any part thereof, fallow or turnip fallow of the preceding summer: wherefore defendant, so being such on-coming tenant, on the several times when, &c., the same respectively being after the 1st day of January preceding the said 6th day of April, 1845, the last-mentioned day being the day on which plaintiff had been required to quit the farm and premises by the notice which plaintiff had so received as aforesaid, entered \*upon the close in which, &c., [‘617 for the purpose of ploughing, &c. (Justification in the usual form.) Verification.

Replication. That, admitting that the close in which, &c., was, before and at the times when, &c., parcel of a certain farm containing, &c., (as in the plea,) which said farm and premises, before and at the said times when, &c., were the farm-house, barn, buildings, soil, and freehold of A. W. R. B., for replication nevertheless in this behalf, plaintiff says that defendant, at the times when, &c., of his own wrong, and without the residue of the cause, &c., committed, &c., in manner and form, &c.

Special demurrer, assigning for cause that the replication is multifarious, and that the form *De injuriâ* is improper and inapplicable (on the ground insisted on in the argument). Joinder in demurrer.

The demurrer was argued in last Trinity vacation.(a)

*Hugh Hill*, for the defendant. The replication puts in issue the alleged interest of the defendant in the land, and therefore violates the second rule in *Crogate's Case*, 8 Rep. 66 b. It is also in violation of the third rule in *Crogate's Case*, because the defendant justifies under an authority derived from the plaintiff. The second rule was held inapplicable in *Edmunds v. Pinniger*, 7 Q. B. 558, where the defendants endeavoured to show that they, being servants of a constable, who was directed by a magistrate's warrant, under stat. 1 & 2 Vict. c. 74, s. 1, \*to re- [‘618 store the landlord to possession, were persons claiming interest as servants of the landlord. But here the interest is direct. The case falls within the principle laid down by PARTESON, J., in *Bowler v. Nicholson*, 12 A. & E. 341, 354. The language of TINDAL, C. J., in *Salter v. Purchell*, 1 Q. B. 209, 219, 220, explains the principle and exception, and points out that, where the defendant claims under an interest derived from the plaintiff, it is reasonable that the plaintiff should traverse specifically an averment, the truth or falsehood of which must be within his own knowledge. It will, however, be objected that the plea is bad on general demurrer, for want of showing an actual demise. But the plea

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To trespass for breaking plaintiff's close, &c., defendant pleaded that plaintiff was tenant from year to year of the locus in quo to B., the owner of the freehold, subject to a stipulation that B., or his on-coming tenant, at any time after the 1st January preceding a 6th April when plaintiff should have received notice to quit on such 6th April, should have liberty to enter and plough; that B. gave plaintiff half a year's notice to quit on a 6th April, and afterwards "agreed to let" to defendant, and defendant "agreed to take" of B., the land, and hold the same to defendant as tenant from year to year after the expiration of plaintiff's tenancy; and defendant "thereupon became and was the on-coming tenant of B." on the expiration of plaintiff's tenancy: and that defendant afterwards entered, between the 1st January and the said 6th April, to plough, &c. (justifying).

*Held*, on demurrer to the replication, a good plea in bar; for that the allegation that defendant became B.'s on-coming tenant was sufficient on general demurrer, assuming that the plea showed no demise from B. to defendant, and that the contract pleaded required a written instrument (as to which assumptions *quære*).

The plaintiff, admitting that the locus in quo was B.'s freehold, replied *De injuriâ absque residuo causæ*.

*Held* bad, on special demurrer, inasmuch as defendant in his plea derived an authority from plaintiff.

TRESPASS for breaking and entering plaintiff's close, and treading down the grass, &c. (with other grievances not pleaded to in the plea after mentioned.)

Plea (3d), as to the grievances above mentioned. That, before and at the said times when, &c., the close in which, &c., was a certain close of arable land, parcel of a certain farm containing divers closes of arable, &c., together with a certain farm-house, barn and other buildings, which said farm and premises, before and at the times when, &c., were the farm-house, &c., soil and freehold of one Alexander William Robert Bosville; and the said farm and premises, before and at the times when, &c., were held, occupied and enjoyed by plaintiff as tenant thereof to A. W. R. B., to wit, as tenant thereof from year to year, upon and subject to certain terms, &c., and, amongst others, the following: that is, that the said A. W. R. B., or his or their on-coming tenant, at any time after the 1st January preceding the 6th day of April when the plaintiff should have

\*616] given or received \*notice to quit the said farm and premises on such last-mentioned 6th day of April, should have full liberty to enter upon, and to plough, &c., all the arable land of the said farm, except the fallows or turnip fallows of the preceding summer: Averment that, whilst plaintiff so held, occupied, &c., the said farm and premises, as such tenant to A. W. R. B., and before any of the said times when, &c., and more than half a year before the expiration of the then current year of the said tenancy, to wit, on 5th October, 1844, A. W. R. B. gave notice to plaintiff that he, plaintiff, should quit the farm and premises on a certain day, to wit, 6th April, 1845, the said last-mentioned day being the day of the expiration of the then current year of the tenancy of plaintiff: That afterwards, and before any of the said times when, &c., to wit, on 1st January, 1845, A. W. R. B. agreed to let to defendant, and defendant then agreed to take, the said farm and premises, to hold the same to defendant

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Replication. That, admitting that the close in which, &c., was, before and at the times when, &c., parcel of a certain farm containing, &c., (as in the plea,) which said farm and premises, before and at the said times when, &c., were the farm-house, barn, buildings, soil, and freehold of A. W. R. B., for replication nevertheless in this behalf, plaintiff says that defendant, at the times when, &c., of his own wrong, and without the residue of the cause, &c., committed, &c., in manner and form, &c.

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does show a demise.(a) If it be said that a writing was necessary,(b) the answer is that a verbal demise for any term less than three years would be enough. And, at any rate, the demise will operate as a lease at will. Besides, it is alleged that the defendant "became, and was, the on-coming tenant" of Bosville: which is sufficient, at least on general demurrer.

*Rew*, contra. *Bowler v. Nicholson* is distinguishable from this case: there an authority given by law was pleaded. Here the plea shows a right which the landlord has reserved, and which therefore has never  
 \*619] been out of him. No interest passes. There is nothing like an authority to view waste, which is the illustration put in *Crogate's Case*, 8 Rep. 67 b. There is merely a license to defendant to enter, as in *Doe dem. Strickland v. Spence*, 6 East, 120, and in *Parker v. Staniland*, 11 East, 362. The argument of TINDAL, C. J., in *Purchell v. Salter*, 1 Q. B. 219, 220, that the party replying has, in the case there put, the means of knowing what he ought to traverse, fails here: the agreement set out is one to which the plaintiff is no party. The authority of *Bowler v. Nicholson*, 12 A. & E. 341, if pressed to the extent here required for the defendant's case, would prove that the replication *De injuriâ* is inadmissible wherever a tenancy, which is pleaded for the purpose of raising the justification, is put in issue: but *Edmunds v. Pinniger*, 7 Q. B. 558, shows that this conclusion would be wrong. The interest here, if any, begins, at earliest, only at the moment of the act complained of; the supposed reversionary lease takes effect still later: therefore there is no such interest as precludes the replication *De injuriâ*; *Bardons v. Selby*, 1 C. & M. 500; S. C. 3 Tyrwh. 430, 9 Bing. 756.(c) Further, the plea is bad. The defendant states himself to be the on-coming tenant, but shows no demise of the reversion giving him that character: the agreement has not the character of an actual demise,(d) nor is it alleged that any written instrument was made, which is essential to give effect to the contract in the character of an agreement, by stat. 29 C. 2, c. 3, s. 4.(e) Perhaps this objection might not prevail after verdict; but  
 \*620] it is fatal on general demurrer. In a plea, where a statute imposes the necessity of a writing which was not required at common law, the existence of the writing must be shown; note (2) to *Duppa v. Mayo*, 1 Wms. Saund. 277 b, 6th ed., where *Case v. Barber*, T. Raym. 450, S. C. 2 (T.) Jones, 158, is cited from Sir T. Raymond's report. From Sir T. Jones's report of the same case it appears that the objection prevailed on general demurrer. *Harden v. Clifton*, 1 Q. B. 522, is to the

(a) The decision of the court renders it unnecessary to report the argument on this point. The following authorities were referred to: *Doe dem. Pearson v. Ries*, 8 Bing. 178; *Goodtitle dem. Eastwick v. Way*, 1 T. R. 735; 4 Bac. Abr. 846, (7th ed.,) tit. *Leases and Terms for Years* (N); Bull. N. P. 177; *Moore v. The Earl of Plymouth*, 3 B. & Ald. 66.

(b) The argument on this point also is omitted, the court having pronounced no decision on it. Reference was made to *Inman v. Stamp*, 1 Stark. N. P. C. 12; *Edge v. Strafford*, 1 Cr. & J. 391; S. C. 1 Tyrwh. 293.

(c) See *Selby v. Bardons* in K. B., 3 B. & Ad. 2.

(d) See *antè*, p. 618, note (a).

(e) See *antè*, p. 618, note (b).



same effect. [Lord DENMAN, C. J. There we could not understand what the plea meant.] If the agreement in the plea is insisted on as amounting to an actual demise, that character should be expressly given to it; note (2) to *Chester v. Willan*, 2 Wms. Saund. 97 c.

*Hugh Hill*, in reply. *Case v. Barber* was decided before the statute of special demurrer, 4 Ann. c. 16, (s. 1,) passed. *Fletcher v. Pogson*, 3 B. & C. 192, shows that the defect, if it be one, is cured by pleading over. It is not here sought to charge a person under the contract as a party to the lease; and therefore it is not necessary to show a writing, as it would be in the case of such party; *Laythoarp v. Bryant*, 2 New Ca. 735. *Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation, (February 14th,) delivered the judgment of the court.

The declaration was in trespass quare clausum fregit. The defendant pleaded that A. W. R. Bosville was seised in fee of the locus in quo, and that the plaintiff \*held it of him, as tenant from year to year, upon [\*621 certain terms, and, amongst others, that Bosville, the landlord, or his on-coming tenant, at any time after the first of January preceding the 6th of April when the plaintiff should have received notice to quit, should have liberty to enter and plough the arable land held by the plaintiff: the plea then averred notice to quit, by Bosville to the plaintiff, on the 6th April, 1845, and that Bosville agreed to let, and defendant agreed to take, the premises as tenant from year to year, from and after the expiration of the plaintiff's tenancy: that defendant thereupon became the on-coming tenant, and entered, after January, 1845, to plough the land; and so justified.

The plaintiff, admitting the seisin in fee of Bosville, replied De injuriâ to the rest of the plea: and the defendant demurred to this replication, on the ground that the plaintiff could not in that form put in issue an authority in law derived from the plaintiff. And we are of opinion that the defendant is right, and entitled to our judgment.

In this case the authority of the defendant arises out of a relation created by the act of parties, one of whom was the plaintiff; the defendant therefore justifies under an authority or power derived from the plaintiff himself. The case therefore is directly within the third resolution in *Crogate's Case*, 8 Rep. 66 b. The plaintiff himself, by the terms upon which he held the land, gave an authority under which alone the defendant could have power to enter: and we therefore think that the \*replication is [\*622 bad for the reason specially assigned in the demurrer.

But it was said, on the part of the plaintiff, that the plea was bad for not stating an actual demise of the premises to the defendant, but only an agreement for a demise, and that not stated to be in writing. We do not think it necessary to consider whether the agreement between Bosville and the defendant did or did not amount to an actual lease at the time of the entry, nor whether it was necessary that it should have been in writing;

as we think enough is stated upon the record to warrant the allegation expressly made that the defendant was "the on-coming tenant," an allegation which might have been traversed: and, if the objection were available at all, we think it would have been on special and not upon general demurrer.

Upon the whole, therefore, our judgment is for the defendant.

Our judgment will be the same in (a) *Milner v. Myers*, *Milner v. Singleton*, *Milner v. F. Jordan*, *Milner v. Dixon*, and *Milner v. Frankish*.

Judgments for defendants accordingly.

(a) In these cases, the defendants justified as servants to W. Jordan.

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The report of *Doe dem. Angell v. Angell*, unavoidably omitted here, will be found in the next volume.

#### END OF HILARY VACATION.

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\*623] The following case, though not decided till Hilary Vacation, 1847, is introduced here, as it settles an important point of Sessions practice.

The QUEEN against The Recorder of LEEDS. *Saturday, February 13th, 1847.*

A parish served with an order of removal, notice of chargeability, and examinations, under stat. 4 & 5 W. 4, c. 76, s. 79, may either appeal to the first practicable sessions after such service, although no actual removal has taken place, or wait till there be an actual removal, and then appeal.

*Hall* moved (January 29th, 1847)(b) for a certiorari to remove into this court an order of the Leeds Borough Sessions, quashing, on appeal, an order of justices for the removal of William Barker from the township of Leeds in the borough of Leeds to the parish of Easingwold in the North Riding of Yorkshire. The material facts stated on affidavit were as follows.

The order of removal was made on 15th April, 1847. Notice of chargeability, and copies of the order and examinations, were sent by post, and received not later than May 2d. The next general quarter sessions for the borough of Leeds were held on July 7th. By the practice of these sessions, notice of appeal is served ten days before the sessions, unless a longer time is required by statute, and, in that case, the statutory notice. In the present instance no notice of appeal was given before the July sessions; nor was any appeal there entered or respited.

(b) Before Lord Denman, C. J., Patteson, Coleridge, and Wightman, Js.

The township of Leeds removed the paupers, on July 18th, to Easingwold parish, which is thirty-four miles distant from Leeds. On 15th September the overseers of Easingwold gave notice of appeal for the next Leeds borough sessions, which were holden \*on 29th October. The [\*624 appeal then came on to be heard; and the respondents contended that the appellants were too late, not having given notice of appeal within twenty-one days after receiving the notice of chargeability and copies of order and examinations, nor entered an appeal at the July sessions. The appellants cited *Regina v. The Justices of Cornwall*, 6 A. & E. 894, and *Regina v. Justices of Salop*, 6 Dowl. P. C. 28; and the recorder, considering himself bound by these authorities, heard the appeal. The order was quashed.

The attorney for the respondents now deposed: "That a practice has arisen, on the part of the overseers of the poor of several townships and parishes in the county aforesaid," (York,) "of giving no notice of appeal against any order of removal until after having entered and respited an appeal at the quarter sessions against such order. That this is done for the purpose of preventing the removing parish from abandoning its order by obtaining a supersedeas thereof, and, unless the removing parish suspends the actual removal of the paupers until after the expiration of the quarter sessions at which an appeal against the order must be entered, has the effect of defeating the provisions of the statute commonly called the Poor-law Amendment Act, to prevent the removal of paupers under an order until the expiration of the time for prosecuting an appeal."

Hall, after stating the above facts, argued as follows. *Regina v. Justices of Salop* was decided before stat. 4 & 5 W. 4, c. 76, had received the full consideration which has since been given to it; and the view \*taken in that case has been corrected in *Regina v. Justices, &c.,* [\*625 *of Yorkshire*, 2 Dowl. & L. 488. The judgment in the former case proceeded on two grounds, both erroneous. The first is that, by the old law, there was no grievance until removal. But the judgment of the removing justices was, and is still, the grievance appealed against: as soon as the parish is affected with the judgment, it is aggrieved. Under the former law this would in general happen at the time of removal, because the order and the pauper were delivered together; but the order was the grievance, the removal only its consequence. The erroneous opinion on this point in *Regina v. Justices of Salop* appears to have been founded on *Rez v. Norton*, 2 Stra. 831. There an order of removal was dated June 21st, and discharged at the Michaelmas sessions; and it was objected in this court that the Midsummer sessions had intervened. It was said at the bar "that by the express words of the statute 13 & 14 C. 2, c. 12, s. 2, the appeal is to be to the next sessions after the parties find themselves aggrieved, which is not till the removal: and for aught appears, Michaelmas sessions might be the next sessions after the grievance. And so it was held in the case of the parishes of Milbrook and

St. John's in Southampton."(a) "To which the court agreed, and the sessions' order was affirmed." But, in the last cited case, (where the order of removal was dated February 12th, and the appeal was decided at the Trinity sessions,) the court merely said: "You cannot take this objection now it is a matter of fact, and perhaps the order was not served  
 \*626] till after the sessions;" you "should have made this objection then." And that was the ground of decision. The same reason seems to have prevailed in the *Case of the Parish of Rugby*, referred to in 19 Viner, Abr. 343, tit. *Sessions of the Peace*, (E) pl. 5, in margin. [PATTESON, J., referred to *Regina v. The Justices of Middlesex*, 9 Dowl. P. C. 163.] The consequences to which, in that case, the doctrine of LITTLEDALE, J., was carried out show that it is unsound in principle. In *Rex v. Bishop Wearmouth*, 5 B. & Ad. 942, all the judges treated service of the order as the grievance against which a district might appeal. *Rex v. The Justices of Pembrokeshire*, 2 East, 213, on the Highway Act, 13 G. 3, c. 78, is an analogous case. A second point, relied on by LITTLEDALE, J., in *Regina v. Justices of Salop*, was that, by service of an order of removal under the present law, no actual grievance was created. But, under stat. 4 & 5 W. 4, c. 76, s. 84, the parish on which the order is made becomes liable to expenses of relief and maintenance from the time when it receives notice of chargeability from the removing parish. This was observed by WIGHTMAN, J., in *Regina v. Justices, &c., of Yorkshire*. And, according to *Regina v. Sow*, 4 Q. B. 93, the contents of the documents served with the order of removal become evidence against the parish receiving them if there be no appeal. This constitutes a grievance from the time of their being served. The statute does not introduce any new right as to appealing: if it does, the appeal is given without any limitation as to time, or direction as to the court which is to try: and the parish appealing has the option of doing so at the next practicable sessions after  
 \*627] being \*served with the order, or at the distance, it may be, of a year; an assumption which is already producing much inconvenience. Cur. adv. vult.

Lord DENMAN, C. J., now delivered judgment.

A motion was made by Mr. Hall, on the 29th of January, on behalf of the township of Leeds, for a certiorari to bring up an order of sessions that it might be quashed, on the ground that an appeal against an order of removal *must* be made at the first practicable sessions after the *order* made and served, and that an appeal at the first practicable sessions after actual *removal* is too late, if it would be out of time calculating from the service *of the order*. As it has been the ordinary practice since the case of *Regina v. Justices of Salop*, reported in 6 Dowling, P. C. 28, to consider the actual removal of the pauper as the grievance to be appealed against, we have paused before we granted a rule which might produce, for a time at least, uncertainty in the practice.

(a) *Millbrook and St. John's, Southampton, Ca. Set. Rem.* 68, 4th ed.

The motion was founded upon stat. 4 & 5 W. 4, c. 76, sects. 79, 81, and 84, and a case in the Bail Court, before my brother WIGHTMAN, of *Regina v. Justices, &c., of Yorkshire*, reported in 2 Dowling and Lowndes, 488, in which he considered that the making and serving the order, with notice of chargeability and copy of the examinations, might, since the passing of stat. 4 & 5 W. 4, c. 76, constitute a sufficient grievance to warrant an appeal.

In coming to this conclusion there was no intention \*to over- rule the case of *Regina v. Justices of Salop*, 6 Dowl. P. C. 28, [\*628 as to the point determined by it, that the appellant may treat the actual removal as the grievance to be appealed against; but my brother WIGHTMAN considered that the appellant might, if he pleased, treat either the order of removal and service with notice of chargeability and copy of the examinations, or the actual removal of the pauper, as the grievance to be appealed against, and that no practical inconvenience can arise from giving the appellant such an option, but rather the contrary; and in this view of the case we concur; and though LITTLEDALE, J., in the case of *Regina v. Justices of Salop*, not only considers that the actual removal may be treated as the grievance to be appealed against, but that the order and service with notice of chargeability and copy of the examinations do not constitute a grievance which can be the subject of appeal, and upon that latter point the judgment of LITTLEDALE, J., is at variance with the case of *Regina v. Justices, &c., of Yorkshire*, 2 Dowl. & L. 488, we are disposed to think that those decisions are not inconsistent upon the points in question in each, and that the appellant may treat either the order and service with notice of chargeability and copy of examinations as the grievance against which he may appeal, as held by my brother WIGHTMAN, or the actual removal of the pauper, as held by LITTLEDALE, J.: and this view of the case is in accordance with the opinion of my brother PATERSON, in the case of *Regina v. The Justices of Middlesex*, 9 Dowl. P. C. 169, 170.

We think it right to give judgment without delay in conformity with the understood practice: and Mr. Hall's application therefore is refused.

Rule refused.

**CASES**  
**ARGUED AND DETERMINED**  
**IN**  
**THE QUEEN'S BENCH,**  
**IN**  
**Easter Term and Vacation,**  
**IX. VICTORIA.**

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The Judges who usually sat in banc in this Term and Vacation, were  
Lord DENMAN, C. J.                      WILLIAMS, J.  
PATTESON, J.                              WIGHTMAN, J.

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**DIRECTION TO TAXING OFFICERS.**

The following direction by the Judges of the several Common Law Courts at Westminster was issued in this term, (April 21st.)

Ordered: That the directions to the Taxing Masters (*a*) be altered, by inserting, after the words "Actions of assumpsit, debt, or covenant," the words "other than cases wherein by reason of the nature of the action no writ of trial can by law be issued." (*b*)

(*a*) Trinity T. 1844, 6 Q. B. 452.

(*b*) See *Walther v. Mess*, 7 Q. B. 189.

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\*630]

**\*REGULA GENERALIS.**

The following rule and regulations were read in Court this term, (*May 5th.*)

**EXAMINATION AND ADMISSION OF ATTORNEYS.**

**Easter Term, 1846.**

Whereas, by section 15 of the statute 6 & 7 Vict. c. 73, it was enacted,

"That it shall be lawful for the Judges of the said Courts of Queen's Bench, Common Pleas, and Exchequer, or any one or more of them, and he and they is and are hereby au-



thorized and required, before he or they shall issue a fiat for the admission of any person to be an Attorney, to examine and inquire, by such ways and means as he or they shall think proper, touching the articles and service and the fitness and capacity of such person to act as an Attorney, and if the Judge or Judges as aforesaid shall be satisfied by such Examination, or by the Certificate of such Examiners, as hereinafter mentioned, that such person is duly qualified and fit and competent to act as an Attorney, then, and not otherwise, the said Judge or Judges shall and he and they is and are hereby authorized and required to administer or cause to be administered to such person the Oath hereinafter directed to be taken by Attorneys and Solicitors, in addition to the Oath of Allegiance, and after such oaths taken to cause him to be admitted an Attorney of such court ;”

And, by section 16 of the said statute, it was enacted,

“ For the purpose of facilitating the inquiry touching the due service under articles as aforesaid, and the fitness and capacity of any person to act as an Attorney,” “ that it shall be lawful for the Judges of the Courts of Queen's Bench, Common Pleas, and Exchequer, (or any eight or more of them, of whom the chiefs of the said Courts shall be three,) from time to time to nominate and appoint such persons to be Examiners for the purposes aforesaid, and to make such Rules and Regulations for conducting such Examinations, as such Judges shall think proper :”

And whereas, in order to carry the said Statute more fully into effect, it is expedient annually to appoint \*Examiners, subject to the [\*631 control of the Judges in manner hereinafter mentioned :

It is ordered, that the several Masters for the time being for the Courts of Queen's Bench, Common Pleas, and Exchequer, respectively, together with sixteen attorneys or solicitors, be appointed by a rule of court in every year to be examiners for one year, any five of whom (one whereof to be one of the said Masters) shall be competent to conduct the examination ; and that, subject to such appeal as hereinafter mentioned, no person who shall not have been previously admitted a solicitor of the High Court of Chancery shall be admitted to be sworn an attorney of any of the Courts, except on production of a certificate signed by the major part of such Examiners actually present at and conducting his Examination testifying his fitness and capacity to act as an attorney ; such certificate to be in force only to the end of the Term next but one following the date thereof, unless such time shall be specially extended by the order of a Judge.

II. It is further ordered that the Examiners so to be appointed shall conduct the said examinations under regulations to be first submitted to and approved by the Judges.

III. And it is further ordered, that, in case any person shall be dissatisfied with the refusal of the Examiners to grant such certificate, he shall be at liberty to apply for admission by petition in writing to the Judges, to be delivered to the Clerk of the Lord Chief Justice of the Court of Queen's Bench, upon which no fee or gratuity shall be received, which application shall be heard in Serjeant's Inn Hall by not less than three of the Judges.

IV. And whereas, the Hall or Building of the \*Incorporated [\*632 Law Society of the United Kingdom, in Chancery Lane, will be a fit and convenient place for holding the said examinations, and the said Society have consented to allow the same to be used for that purpose : it

is further ordered, that, until further order, such examinations be there held on such days as the said Examiners, or any five of them, shall appoint; and that any person not previously admitted an attorney of any of the three Courts, and desirous of being admitted, shall, in addition to the notices already required, give a Term's notice to the said Examiners of his intention to apply for examination, by leaving the same with the Secretary of the said Society at their said Hall; which notice shall also state his place or places of residence or service for the last preceding twelve months; and, in case of application to be admitted on a refusal of the certificate, shall give ten days' notice, to be served in like manner, of the day appointed for hearing the same.

V. And it is further ordered, that, three days at the least before the commencement of the Term next preceding that in which any person not before admitted shall propose to be admitted an attorney to either of the Courts, he shall cause to be delivered at the Masters' Office, instead of affixing the same on the walls of the Courts, the usual written notices, which shall state, in addition to the particulars now required, his place or places of abode or service for the last preceding twelve months; and the Master shall reduce all such notices as in this rule first mentioned into an alphabetical table or tables, under convenient heads, and affix the same, on the first day of Term, in some conspicuous place within or near to and on the outside of each Court. And such person shall also, for the space \*633] of one full Term previous to the Term \*in which he shall apply to be admitted, enter or cause to be entered, in two books kept for that purpose, one at the chambers of the Lord Chief Justice or Chief Baron of the Court in which he applies to be admitted, and the other at the chambers of the other Judges or Barons of such Court, his name and place or places of abode, and also the name or names, and place or places of abode, of the attorney or attorneys to whom he shall have been articulated.

And it is further ordered, that a printed copy of the list of admissions be stuck up in the Queen's Bench, Common Pleas, and Exchequer Offices, and at the Judges' Hall or Chambers of each Court in Rolls Garden.

DENMAN.

N. C. TINDAL.

FRED. POLLOCK.

J. PARKE.

E. H. ALDERSON.

J. PATTESON.

J. WILLIAMS.

T. COLTMAN.

R. M. ROLFE.

WM. WIGHTMAN.

C. CRESSWELL.

W. ERLE.

T. J. PLATT.

## REGULATIONS

APPROVED BY THE JUDGES IN EASTER TERM, 1846, FOR THE EXAMINATION OF PERSONS APPLYING TO BE ADMITTED AS ATTORNEYS OF THE COURTS OF QUEEN'S BENCH, COMMON PLEAS, OR EXCHEQUER, PURSUANT TO THE RULE OF COURT MADE IN EASTER TERM, 1846.

WHEREAS, by a rule of the Courts of Queen's Bench, Common Pleas, and Exchequer, made in Easter Term, 1846, it was ordered that the several Masters for the time being of the said Courts respectively, together with Sixteen Attorneys or Solicitors, should be appointed by a rule of Court in every year to be Examiners for One Year of persons applying to be admitted Attorneys of the said Courts, any five of whom (one whereof to be one of the said Masters) should be competent to conduct the Examination, and that, subject to such appeal as thereafter mentioned, no person not previously admitted a Solicitor of the High Court of Chancery should be admitted to be sworn an Attorney of any of the said Courts, except on production of a certificate signed by the major part of such Examiners actually present at and conducting his Examination, testifying his fitness and capacity to act as an Attorney; such certificate to be in force only to the end of the term next but one following the date thereof, unless such time should be specially extended by the order of a Judge: And it was further ordered, that the Examiners so to be appointed should conduct the said Examinations under regulations to be first submitted to and approved by the Judges; and that until further order such Examinations should be held in the Hall or building of the Incorporated Law Society of the United Kingdom in Chancery Lane, on such days as the said Examiners, or any five of them, should appoint; and that any person not previously admitted of any of the three Courts, and desirous of being admitted, should give a Term's notice of his intention to apply for Examination, by leaving the same with the Secretary of the said Society at their said Hall:

In pursuance of the said rule, the following regulations for conducting the said Examinations have been submitted to and approved by the Judges of the said Courts.

\*I. That every person applying to be admitted an Attorney of any of the said Courts pursuant to the said rules shall, within the first seven days of the term in which he is desirous of being admitted, leave, or cause to be left, with the secretary of the said Incorporated Law Society his articles of Clerkship duly stamped, and also any assignment which may have been made thereof, together with answers to the several questions hereunto annexed, signed by the applicant and also by the Attorney or Attorneys with whom he shall have served his clerkship.

II. That in case the Applicant shall show sufficient cause, to the satisfaction of the Examiners, why the first regulation cannot be fully com-

plied with, it shall be in the power of the said Examiners, upon sufficient proof being given of the same, to dispense with any part of the first regulation that they may think fit and reasonable.

III. That every person applying for admission shall also, if required, sign and leave, or cause to be left, with the secretary of the said Society answers in writing to such other written or printed questions as shall be proposed by the said Examiners, touching his said service and conduct, and shall also, if required, attend the said Examiners personally, for the purpose of giving further explanations touching the same, and shall also, if required, procure the Attorney or Attorneys with whom he shall have served his clerkship as aforesaid to answer either personally or in writing any questions touching such service or conduct, or shall make proof to the satisfaction of the said Examiners of his inability to procure the same.

\*636] IV. That every person so applying shall also attend \*the said Examiners at the hall of the said Society, at such time or times as shall be appointed for that purpose, pursuant to the said rule, as the said Examiners shall appoint, and shall answer such questions as the said Examiners shall then and there put to him by written or printed papers touching his fitness and capacity to act as an Attorney.

V. That, upon compliance with the aforesaid regulations, and if the major part of the said Examiners actually present at and conducting the said Examination (one of them being one of the said Masters) shall be satisfied as to the fitness and capacity of the person so applying to act as an Attorney, the said Examiners so present, or the major part of them, shall certify the same under their hands in the following form, viz.:

“In pursuance of the rules made in Easter Term, 1846, of the Courts of Queen’s Bench, Common Pleas, and Exchequer, we, being the major part of the Examiners actually present at and conducting the Examination of A. B., of, &c., do hereby certify that we have examined the said A. B. as required by the said rules: And we do testify that the said A. B. is fit and capable to act as an Attorney of the said Courts.”

#### QUESTIONS AS TO DUE SERVICE OF ARTICLES OF CLERKSHIP.

*To be answered by the Clerk.*

I. What was your age at the date of your Articles?

II. Have you served the whole term of your Articles at the office where the Attorney or Attorneys to whom you were articled or assigned carried on his or their business? And, if not, state the reason.

III. Have you at any time during the term of your Articles been absent without the permission of the Attorney or Attorneys to whom you were articled or assigned? And, if so, state the length and occasions of such absence.

\*637] IV. Have you during the period of your Articles been engaged or \*concerned in any profession, business, or employment, other than your professional employment as Clerk to the Attorney or Attorneys to whom you were articled or assigned?

V. Have you since the expiration of your Articles been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment, other than the profession of an Attorney or Solicitor?

*Questions to be answered by the Attorney, Agent, Barrister, or Special Pleader, with whom you may have served any part of your Time under your Articles.*

I. Has A. B. served the whole term of his Articles at the office where you carry on your business? And, if not, state the reason.

II. Has the said A. B. at any time during the term of his Articles been absent without your permission? And, if so, state the length and occasions of such absence.

III. Has the said A. B. during the period of his Articles been engaged or concerned in any profession, business, or employment other than his professional employment as your Articled Clerk?

IV. Has the said A. B. during the whole term of his Clerkship, with the exceptions above mentioned, been faithfully and diligently employed in your professional business of an Attorney or Solicitor?

V. Has the said A. B. since the expiration of his Articles been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment other than the profession of an Attorney or Solicitor?

And I do hereby certify that the said A. B. hath duly and faithfully served under his Articles of Clerkship (or assignment, as the case may be), bearing date, &c., for the term therein expressed, and that he is a fit and proper person to be admitted an Attorney.

DENMAN.

N. C. TINDAL.

FRED. POLLOCK.

J. PARKE.

E. H. ALDERSON.

J. PATTESON.

J. WILLIAMS.

T. COLTMAN.

R. M. ROLFE.

WM. WIGHTMAN.

C. CRESSWELL.

### \*REGULA GENERALIS.

[\*638

The following Rule was read in Court this Term (May 6th).

#### RENEWAL OF ATTORNEYS' CERTIFICATES.

Easter Term, 1846.

WHEREAS, by section 25 of the statute 6 & 7 Vict. c. 73, it was enacted that, "if any attorney shall neglect to procure an annual stamped certificate authorizing him to practise as such within the time by law appointed for that purpose, then and in such case the Registrar of attorneys and solicitors shall not afterwards grant a certificate to such attorney without the order of one of the Courts of Queen's Bench, Common Pleas or Exchequer, or of one of the Judges thereof, to issue such certificate:

And whereas it is expedient that, upon the application of an attorney having neglected for the space of one whole year to procure or to renew an annual stamped certificate, the Judges should have means of inquiring as to the circumstances under which he has omitted to commence or has discontinued to practise, and as to his conduct and employment during the term of such omission or discontinuance:

IT IS ORDERED, that, from and after the last day of Trinity Term next, every person who shall intend to apply on the last day of Term or in vacation for such order shall, three days at the least previous to the first

\*639] day of \*the Term, on the last day of which application is intended to be made, or, in case the application is to be made in the vacation, shall, previous to the first day of the preceding Term, leave at the office of the Masters of the Court in which he intends to make the application a notice in writing, containing his name and place of abode for the last preceding twelve months. And that before the said first day of Term he shall enter or cause to be entered a like notice in two books kept for that purpose, one at the chambers of the Lord Chief Justice or Chief Baron, and the other at the chambers of the other Judges or Barons, and shall before the said first day of Term cause to be filed the affidavit upon which he seeks to obtain or renew his said certificate at the office of the Masters aforesaid, and a copy thereof to be also left at the chambers of the Lord Chief Justice of the Court of Queen's Bench.

And it is further ordered, that the Masters reduce such notices into alphabetical order, and add the same to the List of Admissions; and the order for the granting the certificate shall be drawn up on reading such affidavit of such copy having been left in compliance with this rule.

DENMAN.

T. COLTMAN.

N. C. TINDAL.

R. M. ROLFE.

FRED. POLLOCK.

WM. WIGHTMAN.

J. PARKE.

C. CRESSWELL.

E. H. ALDERSON.

W. ERLE.

J. PATTESON.

T. J. PLATT.

J. WILLIAMS.

\*640] \*In the Matter of a Suit in the Arches Court of CANTERBURY, entitled "Arches. The Office of the Judge promoted by BARNES against SHORE."

The fourth section of the Toleration Act, 1 stat. 1 W. & M. c. 18, exempting persons who shall take the oaths and subscribe the declaration there mentioned from prosecution in the Ecclesiastical Court for nonconforming to the Church of England, extends not only to lay persons but to clergymen who, after being ordained, dissent from the church.

*Seemle*, that, to claim this exemption, it is sufficient that the party states himself to be a dissenter, without any more formal act.

But a person ordained a priest in the Church of England cannot, in this manner or otherwise at his own pleasure, divest himself of his orders, so as to exempt himself from correction by the bishop for breach of ecclesiastical discipline.

Performance, by such priest, of the church service in an unconsecrated chapel, not licensed by the bishop, and against his monition, is such a breach of discipline, and not a mere act of nonconformity protected by the Toleration Act or by stat. 52 G. 3, c. 155.

So held on motion for a prohibition, where articles had been exhibited in the Ecclesiastical Court, under stat. 3 & 4 Vict. c. 86, against a priest for such irregular performance of service, and he put in defensive allegations, stating that, before he did the acts complained of, he had seceded from the Church of England, and was minister of a congregation of protestant dissenters, assembling in the unlicensed chapel. Prohibition refused.

SIR F. KELLY, Solicitor-General, in Michaelmas Term, 1845, obtained a rule calling upon Ralph Barnes, (on notice to his proctor,) and Sir He:-



bert Jenner Fust, Knight, LL.D., Official Principal of the Arches Court of Canterbury, (on notice to him or his deputy,) to show cause why a prohibition should not issue to the said Arches Court, to prohibit that court from further proceeding in the suit between the parties.

The rule was granted on the affidavit of "James Shore, of Bridgetown, in the parish of Berry Pomeroy, in the county of Devon, clerk," who stated that, on 3d May, 1845, Sir H. J. Fust, Official Principal, &c., did (as deponent was informed and believed) "give and administer in the Arches Court, certain articles," &c., "which articles," &c., were and are of the tenor following, viz. :

"Arches. The office of the Judge promoted by \*Barnes against Shore. In the name of God, Amen. We H. J. Fust, Knight, LL.D., Official Principal," &c., "do, by virtue of our office, at the voluntary promotion of Ralph Barnes of the city of Exeter, gentleman, object, give and administer to you, the Rev. James Shore, clerk, a priest or minister in holy orders of the United Church of England and Ireland, of Bridgetown, in the parish of Berry Pomeroy, in the county of Devon and diocese of Exeter and province of Canterbury, all and singular the articles, heads, positions or interrogatories hereunder written or hereafter mentioned, touching and concerning your soul's health and the lawful correction and reformation of your manners and excesses, and more especially for your having offended against the laws ecclesiastical by publicly reading prayers, preaching, administering the Holy Sacrament of the Lord's Supper, and performing ecclesiastical duties and divine offices according to the rites and ceremonies of the said United Church of England and Ireland, in a certain unconsecrated chapel or building, situate in the said parish," &c., "without any license or authority for so doing, and contrary to and in spite of the injunction or monition of the Right Rev. Father in God Henry by divine permission Bishop of Exeter; as follows, to wit:

1. "We article and object to you, the said Rev. J. S., clerk, that, by the laws, canons and constitutions ecclesiastical of this realm, no minister of the Church of England can lawfully officiate in any parish church or chapel, or any other place within this realm, by publicly reading prayers, preaching, administering the Holy Sacrament of the Lord's Supper, or performing any other ecclesiastical duties therein according to the rites and ceremonies of the United Church of England and \*Ireland, as by law established, without a sufficient permission or authority for so doing, and a license first had and obtained from the bishop of the diocese or ordinary of the place, having episcopal jurisdiction, in writing under his hand and seal for that purpose; and that you know, believe or have heard that persons offending in the premises are to be duly and canonically punished and corrected for the same; and we article and object to you every thing in this and subsequent articles contained jointly and severally.

2. "We also article," &c., "that you, being at such time a deacon of the Church of England, were, on or about the 25th October, 1829, duly

admitted into the holy order of priest of the Church of England by the Right Rev. Father in God William, by divine permission then Lord Bishop of Exeter; and that as and for a priest and minister of the said church you have ever since been, and now are, commonly accounted, reputed and taken: and we article," &c., "as before."

3. "Also we article," &c., "that, in supply of proof," &c., "we exhibit," &c.: the article then referred to, and authenticated, the exhibit of an extract from the Register book of ordinations by the bishop, showing that, on 25th October, 1829, at an ordination held by the Bishop of Exeter, James Shore, among others, was admitted into the order of priesthood, first taking the requisite oaths, and subscribing the thirty-nine articles of religion, and the three articles set forth in the 36th canon. And the now recited article verified the matters stated in the extract, and identified the James Shore therein mentioned with the party to whom these articles were directed.

4. "Also we article," &c., "that the aforesaid Right Reverend," &c.,  
 \*643] "Henry," &c., "now Lord Bishop of \*Exeter, did, by an instrument in writing under his hand and Episcopal Seal, and bearing date on or about the 7th March, 1844, duly revoke a license, previously granted to you by him, the said Lord Bishop of Exeter, to perform the office of minister of the aforesaid unconsecrated chapel or building situate in the said parish of Berry Pomeroy, in the county," &c., "and did recall the authority given to you by such license to perform the office of minister of the chapel or building aforesaid, and did strictly enjoin and charge you thenceforth to abstain from further performing the office of minister of the chapel or building aforesaid, and from officiating therein; and that such instrument of revocation was duly served upon you on the 13th of the said month of March, 1844: and we article," &c., "as before."

5. This article referred, in supply of proof, &c., to the original instrument of revocation, remaining in the bishop's registry at Exeter, (and to be produced, if necessary, at the hearing of the cause,) with a certificate of service endorsed: identified James Shore, as was done in the 3d article, and identified the chapel named in the recited instrument with the chapel mentioned in these articles.

6. This article authenticated the signature and seal of the bishop to the instrument of revocation.

7. "Also we article," &c., "that, notwithstanding the premises in the foregoing article mentioned, you did, on Sunday, the 14th April, 1844, and also on Sunday, the 28th July in the said year 1844, take upon you publicly to read prayers, preach, administer (to wit, on said 28th July, 1844) the Holy Sacrament of the Lord's Supper, and perform ecclesiastical duties and divine offices according to the rites and ceremonies of  
 \*644] \*the United Church of England and Ireland, in the said unconsecrated chapel or building situate in the said parish of Berry Pomeroy in the county," &c., "without any license or authority for so doing,

and contrary to and in spite of the aforesaid injunction or monition of the said Bishop of Exeter: and we article and object to you of any other time or times as shall appear from the proofs to be made in this cause, and as before."

8. "Also we article," &c., "that you were and are a priest or minister in holy orders of the United Church of England and Ireland, and reside within the said parish of Berry Pomeroy, in the county," &c., "and that there was and is a scandal and evil report in the said diocese against you the said Rev. J. S., clerk, as having offended," &c., by publicly reading, &c., and performing ecclesiastical duties, &c., (verbatim as in the introductory part of these articles,) "in the said unconsecrated chapel or building, situate in the said parish of B. P., without any license or authority for so doing, and contrary to and in spite of the aforesaid injunction or monition of the said Bishop of Exeter; and that, by reason thereof, and of a certain act," &c., (3 & 4 Vict. c. 86,) "'for better enforcing church discipline,' and of the letters of request under the hand and seal of the bishop of the said diocese of Exeter, presented and accepted in this cause, you were and are subject of the jurisdiction of this court: and we article and object to you as before."

9. "Also we article," &c., "that of and concerning the premises it hath been and is rightly and duly complained by the said Ralph Barnes, the voluntary promoter of our office, to us the judge, and to this court aforesaid: and we article," &c.

10. "Also we article," &c., "that all and singular the premises were and are true, public and notorious, \*and thereof there was and is a public voice, fame and report, of which legal proof being made to us the judge aforesaid, and to this court, we will that right and justice be effectually done and administered in the premises, and that you, the said Rev. James Shore, clerk, for your excess in the premises, be admonished to abstain for the future from publicly reading prayers, preaching, and administering the Holy Sacrament of the Lord's Supper, or performing ecclesiastical duties or divine offices in the said unconsecrated chapel or building situate in the said parish of B. P. for the future without a license or other authority in that behalf first had and obtained, and that you be otherwise duly and canonically punished and corrected according to the nature of your offence and the exigency of the law, and that you be condemned in the costs made and to be made on the part and behalf of the said Ralph Barnes, a promoter of our office in this cause, and be compelled to the due payment thereof, he humbly imploring the aid of our office in this behalf." [645]

Mr. Shore's affidavit went on to state that the unconsecrated chapel or building mentioned in the articles is, and, on the 14th April and 28th July therein mentioned, (Art. 7,) was, "a place of meeting for a congregation of Protestants dissenting from the discipline of the Church of England." That, on 26th February, 1844, the said chapel, &c., was duly

certified to the Court of the Archdeacon of the Archdeaconry of Totnes, in which the said chapel, &c., is situate, by Thomas Michelmores, agent to the Duke of Somerset, then being a proprietor of the said chapel, &c., according to stat. 52 G. 3, c. 155, as a place intended to be used as a place of meeting of a congregation or assembly for religious worship of

\*646] Protestants: \*that the chapel, &c., was thereupon duly registered in the Archdeacon's Court, and certificate of the registry given; that the deponent, on 16th March, 1844, took the oaths and made the declarations required by the statute,<sup>(a)</sup> with a view to "declaring himself a conscientious dissenter from the discipline of the Church of England as by law established;" "that he, deponent, verily and in his conscience believes that, by reason of his having taken such oaths, and made and subscribed such declarations, he, deponent, hath done all that the law requires of him to declare, as he doth upon his oath now declare, his conscientious dissent from the discipline of the Church of England, and that he, deponent, hath not, from the period of his taking such oaths and subscribing such declarations, considered himself, and doth not now consider himself, a minister or member of the said church, nor hath he in any way officiated as such." And that, in the suit commenced against him in the Arches Court by Ralph Barnes, the secretary of the Lord Bishop of Exeter, and now pending, "an allegation, pleading the facts and circumstances above mentioned, was tendered into the said Court of Arches on behalf of deponent, but rejected."<sup>(b)</sup> Mr. Shore annexed an exhibit of the oaths taken and declarations made by him, namely, the oaths of allegiance and supremacy, and the declarations prescribed by 2 stat. 30 Car. 2, c. 1, s. 3, and stat. 19 G. 3, c. 44, s. 1. He also set forth, as an exhibit, the defensive allegation propounded by him and rejected, the material parts of which were as follows.

\*647] 1. "That the unconsecrated chapel or building at \*Bridgetown, situate," &c., (mentioned in the articles,) "is a place of meeting of a congregation, or assembly for religious worship, of Protestant dissenters from the Church of England; and that, on the 26th day of February, 1844, in pursuance of an act," &c., (52 G. 3, c. 155,) "the said chapel was duly certified," &c.; stating the certificate by Michelmores, and the registration, as in the body of Mr. Shore's affidavit.

2. Referring to an exhibit of the entries in the Register of the Archdeaconry Court of Totnes, relative to the above certificate; affirming the truth of the matters contained in such entry; and identifying the chapel.

3. "That the said Rev. James Shore has on conscientious grounds seceded from and ceased to conform to the Church of England, and was, at the time of service of the citation or decree issued in this cause on the part and behalf of the said Ralph Barnes, and is now, a Protestant dissenting minister in holy orders, and a preacher and teacher of a congrega

(a) 52 G. 3, c. 155, sect. 5, referring to stat. 19 G. 3, c. 44, s. 1.

(b) August 1th, 1845. *Barnes v. Shore*, 1 Robertson's Ecc. Rep. 382.

tion of Protestant dissenters assembling and accustomed to assemble for religious worship in the aforesaid duly certified chapel called Bridgetown Chapel;" and that, on, &c.; averment that Mr. Shore took the oaths and made the declarations required by stat. 52 G. 3, c. 155. "And the party proponent" (the proctor for Shore) "doth expressly allege and propound that his said party, the said Rev. James Shore, having taken the said oaths and made and subscribed the declaration aforesaid, was and is entitled to all the exemptions, benefits, privileges and advantages granted to her Majesty's Protestant subjects dissenting from the Church of England by an act made," &c., (1 stat. 1 W. & M. c. 18,) "and, according to the provisions of the aforesaid statute, is not \*liable to be prosecuted in any ecclesiastical court for or by reason of his nonconforming to the Church of England." [\*648

4. Referring to exhibit of a justice's certificate as to the taking of the oaths, &c., by Shore; authenticating the certificate, affirming the truth of its contents, and identifying Shore with the James Shore therein named.

5. "That a notice, purporting to be a monition or injunction under the seal of the Lord Bishop of Exeter, and signed by Ralph Barnes, deputy registrar, and bearing date the 7th day of March, 1844, being the very monition or injunction mentioned in the original citation or decree issued in this cause and in the articles given in and admitted in this cause on the part and behalf of the said Ralph Barnes, charging the said Rev. James Shore thenceforth to abstain from further performing the office of minister of the aforesaid unconsecrated chapel or building situated in the parish of B. P. aforesaid, and from officiating therein, was served personally upon the said James Shore on the 13th day of March aforesaid by Frederick Smith, a clerk of the said Ralph Barnes: and the party proponent expressly alleges and propounds that the said Rev. J. S. has not at any time since the service of the said monition or injunction, and more especially did not, either on Sunday the 14th day of the month of April, 1844, or on Sunday the 28th day of the month of July in the said year 1844, as untruly alleged in the seventh of the positions or articles so given in and admitted in this cause as aforesaid, officiate as a priest or minister in holy orders of the United Church of England and Ireland, contrary to and in spite of the aforesaid injunction or monition of the said Bishop of Exeter, but has constantly since the \*service of the said injunction or monition conducted the religious worship of a congregation of Protestant dissenters from the Church of England, assembling and accustomed to assemble in the aforesaid duly certified chapel called Bridgetown Chapel as a Protestant dissenting minister, and as a preacher and teacher of the said congregation: that, although the said Rev. J. S., as minister of the said congregation, on the occasions above pleaded, availed himself, as many other Protestant dissenting ministers are accustomed to do, of some of the forms set forth in the Book of Common Prayer, yet he hath made variations therein, as not conforming to the said church." [\*649

6. That the premises are true, public, and notorious, &c.

A further affidavit was made by four persons, stating: "That they are severally members of the congregation of Protestants assembling for Divine worship in Bridgetown, in the parish," &c., "where the Rev. James Shore is the officiating minister; and that such chapel hath been duly licensed; and that they, deponents, consider such chapel to be a place for the worship of Protestants dissenting from the Church of England; and that as such dissenting Protestants they, deponents, attend divine worship therein."

In opposition to the rule, affidavits were made by two persons who stated that they on the 14th of April and 28th of July, 1844, heard Mr. Shore perform divine service at Bridgetown Chapel, according to the liturgy, rites and ceremonies of the United Church of England and Ireland, and in the same way as ministers of the Church of England are accustomed to perform it. On the former day he preached a sermon; on

\*650] the latter \*(when the sacrament was to be administered) none was preached. To one of the affidavits (by the principal clerk in the registry of the diocese of Exeter) were annexed exhibits, duly verified, of the following documents. Copy of the bishop's license granted to Mr. Shore, on the nomination of the Rev. John Edwards, vicar of the vicarage and parish church of Berry Pomeroy, to perform the church services at Bridgetown Chapel; dated April 20th, 1833. Extracts from the Register book of ordinations, by which, and by the book of subscriptions before ordination, it appeared that Mr. Shore, on 18th October, 1828, before being ordained deacon, and on 24th October, 1829, before being ordained priest, subscribed the Thirty-nine articles and the Three articles of the 36th canon. The affidavit further stated that, as appeared by the latter book, Mr. Shore, after being ordained deacon, and in order to his being licensed to serve the cure of Berry Pomeroy, subscribed (with other persons) a declaration "that we will conform to the liturgy of the United Church of England and Ireland as it is now by law established." The affidavit also gave, as exhibits, a copy, from the register book in the registry of the diocese, of the bishop's license (granted 9th November, 1832, on the petition of the Duke of Somerset, the founder) for the performance of divine service in the Bridgetown Chapel according to the rites, &c., of the United Church, &c., by a minister in holy orders, to be licensed by the bishop. And the revocation under the bishop's seal, dated March 7th, 1844, and addressed to James Shore, clerk, M. A., reciting the grant of license to Shore, and proceeding as follows: "And whereas the said vicarage and parish church

\*651] of B. P. afterwards became vacant by the death of the said J. Edwards; and whereas the Rev. William Burrough Cosens is now vicar of the said vicarage and parish church of B. P.; and the said W. B. C. since he became vicar of the said vicarage has not nominated you the said James Shore to be by us licensed to officiate in the said chapel: Now we the said bishop do hereby revoke, annul and make void the said license by us granted to you the said J. S., hereinbefore set forth, and do declare



that the same shall from thenceforth be held to be revoked and null and void: And we do hereby monish you the said J. S. to cease to officiate in the said chapel, and do prohibit you from officiating therein."

The proctor for Barnes also deposed as follows. "That he is engaged on behalf of Ralph Barnes of the city of Exeter, gentleman, in conducting certain proceedings now pending in the Arches Court of Canterbury against the Rev. James Shore, clerk, under and in virtue of a certain act of parliament," &c., (3 & 4 Vict. c. 86,) "in the course whereof certain articles, setting forth the charges made against the Rev. James Shore, with exhibit annexed marked A., being the articles and exhibit mentioned and set forth in the affidavit of the said Rev. James Shore sworn in this matter on the 3d November last, were brought into court on behalf of the said R. Barnes, and admitted without opposition. That, subsequently to the admission of the said articles and exhibit, the proctor for the said Rev. J. Shore admitted in acts of court that his party, the said Rev. J. S., had been duly admitted into the holy order of priest of the Church of England, pleaded amongst other things in the said articles, and that the license theretofore granted by the Lord Bishop of Exeter to his said party to perform the office of minister of a certain \*unconsecrated chapel or building situate within the diocese of Exeter had been duly re- [\*652] voked by the said bishop, also pleaded in the said articles, previous to the times at which the said Rev. J. Shore was charged in the said articles to have officiated as a priest or minister in the said chapel."

In last Hilary term, (a)

Sir F. Thesiger, Attorney-General, Dr. Addams, and M. Smith showed cause. The ground of this application is that Mr. Shore, having declared his dissent from the Church of England, and having taken the oaths and made the declarations mentioned in stat. 52 G. 3, c. 155, sects. 4, 5, is entitled to the exemption given by that act and 1 stat. 1 W. & M. c. 18, (b) from penalties for nonconformity and \*attending conven- [\*653] ticles, and is therefore protected against this suit in the ecclesias-

(a) January 28th. Before Lord Denman, C. J., Patteson, Coleridge, and Wightman, J.

(b) 1 Stat. 1 W. & M. c. 18, "for exempting their majesties' Protestant subjects, dissenting from the Church of England, from the penalties of certain laws," enacts:

Sect. 2. That neither stat. 23 Eliz. c. 1, nor certain subsequent acts of Elizabeth and James I., nor any other law or statute against Papists or Popish recusants, except certain statutes of Charles II. recited in this clause, "shall be construed to extend to any person or persons dissenting from the Church of England, that shall take the oaths mentioned in a statute," &c., (oaths of allegiance and supremacy, 1 stat. 1 W. & M. c. 1, s. 5,) "and shall make and subscribe the declaration mentioned in a statute," &c., (declaration against transubstantiation, &c., 2 stat. 30 C. 2, c. 1, s. 3;) "which oaths and declaration the justices of peace at the general sessions of the peace, to be held for the county or place where such persons shall live, are hereby required to tender and administer to such persons as shall offer themselves to take, make and subscribe the same, and thereof to keep a register," &c.

Sect. 4 enacts: "That all and every person and persons that shall, as aforesaid, take the said oaths, and make and subscribe the declaration aforesaid, shall not be liable to any pains, penalties, or forfeitures, mentioned in an act made," &c., (35 Eliz. c. 1;) "nor in an act made," &c., (22 C. 2, c. 1;) "nor shall any of the said persons be prosecuted in any ecclesiastical court, for or by reason of their non-conforming to the Church of England."

Sect. 8 enacts: "That no person dissenting from the Church of England in holy orders, or

tical court. The answer is, that Mr. Shore is proceeded against, not as a nonconformist or frequenter of a conventicle, but, according to stat. 3 & 4 Vict. c. 86, (a) as a clergyman of the \*Church of England, offending against ecclesiastical discipline.

The relief given by 1 stat. 1 W. & M. c. 18, consisted in exemption from the penalties of certain recited statutes, on condition of taking the oaths and subscribing the declaration mentioned in sect. 2. Of these acts, so far as they can at all be supposed relevant to the present case, there are two classes; the statutes of Elizabeth and James, enumerated in sect. 1, which punished non-attendance on the established divine service, (a neglect, however, which continued to be an offence at common law, and punishable by the ecclesiastical courts; 1 Gibs. Cod. 291, 2, note (b), (2d ed. ;) citing *Britton v. Standish*, 6 Mod. 188,

pretended holy orders, or pretending to holy orders, nor any preacher or teacher of any congregation of dissenting Protestants, that shall make and subscribe the declaration aforesaid, and take the said oaths at the general or quarter sessions of the peace to be held for the county, town, parts, or division where such person lives, which court is hereby empowered to administer the same, and shall also declare his approbation of and subscribe the articles of religion mentioned in the statute made," &c., (13 Eliz. c. 12, s. 1,) "except the 34th, 35th, and 36th, and these words of the 20th article, viz.: [*the church hath power to decree rites or ceremonies, and authority in controversies of faith, and yet*] shall be liable to any of the pains or penalties mentioned in an act made," &c., (17 C. 2, c. 2;) "nor the penalties mentioned in the aforesaid act made," &c., (22 C. 2, c. 1,) for or by reason of such persons preaching at any meeting for the exercise of religion; nor to the penalty of 100*l.* mentioned in an act made," &c., (13 & 14 C. 2, c. 4,) "for associating in any congregation for the exercise of religion permitted and allowed by this act."

(The material clauses of stat. 52 G. 3, c. 155, will be found in p. 655, note (a), post.)

(a) Stat. 3 & 4 Vict. c. 86, "for better enforcing church discipline," enacts:

Sect. 3. "That in every case of any clerk in holy orders of the United Church of England and Ireland who may be charged with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or if he shall think fit of his own mere motion, to issue a commission under his hand and seal to five persons, of whom one shall be his vicar general, or an archdeacon or rural dean within the diocese, for the purpose of making inquiry as to the grounds of such charge or report." Notice to be given to the party accused.

Sects. 4 and 5 point out the proceedings to be taken by the commissioners, and sects. 5 to 12 (inclusive) the proceedings on their report.

Sect. 13 provides and enacts: "That it shall be lawful for the bishop of any diocese within which any such clerk shall hold any preferment, or if he hold no preferment, then for the bishop of the diocese within which the offence is alleged to have been committed, in any case, if he shall think fit, either in the first instance or after the commissioners shall have reported that there is sufficient *prima facie* ground for instituting proceedings, and before the filing of the articles, but not afterwards, to send the case by letters of request to the court of appeal of the province, to be there heard and determined according to the law and practice of such court."

Sect. 15 enacts: "That it shall be lawful for any party who shall think himself aggrieved by the judgment pronounced in the first instance by the bishop," (for which authority is given by sect. 6, where parties consent,) "or in the court of appeal of the province, to appeal from such judgment; and such appeal shall be to the archbishop, and shall be heard before the judge of the court of appeal of the province, when the cause shall have been heard and determined in the first instance by the bishop, and shall be proceeded in in the said court of appeal in the same manner and subject only to the same appeal as in this act is provided with respect to cases sent by letters of request to the said court; and the appeal shall be to the Queen in Council, and shall be heard before the Judicial Committee of the Privy Council when the cause shall have been heard and determined in the first instance in the court of the archbishop."

S. C., 1 Salk. 166, 3 Salk. 88, and an *Anonymous* case in Skinner, 101 ;) and the statutes of \*Charles II., referred to in sects. 4 and 8, [\*655 which relate to preaching in conventicles and irregular performance of divine services. But these acts, on examination, will be found to have no bearing on the subject of the present suit. Sect. 4 of 1 stat 1 W. & M. c. 18, may be referred to on the other side. It enacts that persons taking the oaths and making the declaration prescribed by that act shall not "be prosecuted in any ecclesiastical court, for or by reason of their nonconforming to the Church of England." But this clause (the only one which excludes the ecclesiastical jurisdiction) cannot be taken to comprehend an offence against conformity committed, as in the present case, by a person in holy orders ; for, by sect. 8, such a person, officiating in any congregation for the exercise of religion permitted and allowed by this act, is not exempted even from the penalties of stat. 17 Car. 2, c. 2 22 Car. 2, c. 1, or the Act of Uniformity, 13 & 14 Car. 2, c. 4, unless he subscribes all the articles of religion except the 34th, 35th and 36th, and part of the 20th. According to the view taken on the other side, a person in orders, so officiating, would be exempt from the ecclesiastical jurisdiction though he had ~~not~~ subscribed the articles. Stat. 52 G. 3, c. 155,(a) repeals certain penal acts \*of the reign of C. II., and provides for [\*656 the allowance of religious worship by Protestants in places duly

(a) Stat. 52 G. 3, c. 155, "to repeal certain acts, and amend other acts relating to religious worship and assemblies and persons teaching or preaching therein," after forbidding, by sect. 2 any "congregation or assembly for religious worship of Protestants" beyond a certain number, unless the place of meeting shall have been certified and registered as in that clause is particularly directed, and imposing a penalty on any person knowingly permitting such congregation to meet in any place occupied by him, until certified, enacts :

Sect. 4. "That, from and after the passing of this act, every person who shall teach or preach at, or officiate in, or shall resort to any congregation or congregations, assembly or assemblies for religious worship of Protestants, whose place of meeting shall be duly certified according to the provisions of this act, or any other act or acts of parliament relating to the certifying and registering of places of religious worship, shall be exempt from all such pains and penalties under any act or acts of parliament relating to religious worship, as any person who shall have taken the oaths, and made the declaration prescribed by or mentioned in an act, made," &c., (1 stat. 1 W. & M. c. 18,) "or any act amending the said act, is by law exempt, as fully and effectually as if all such pains and penalties, and the several acts enforcing the same, were recited in this act, and such exemptions as aforesaid were severally and separately enacted in relation thereto."

Sect. 5 enacts : "That every person not having taken the oaths and subscribed the declaration hereinafter specified, who shall preach or teach at any place of religious worship certified in pursuance of the directions of this act, shall, when thereunto required by any one justice of the peace, by any writing under his hand or signed by him, take and make and subscribe, in the presence of such justice of the peace, the oaths and declarations specified and contained in an act, passed," &c., (19 G. 3, c. 44 ;) and no person who, being required, shall refuse to attend and take the oaths, &c., shall thereafter be allowed to teach or preach in any such congregation, &c., until he shall have taken such oaths, &c., on pain of forfeiting, &c.

Sect. 13. "Provided always, and be it further enacted, That nothing in this act contained shall affect or be construed to affect the celebration of divine service according to the rites and ceremonies of the United Church of England and Ireland, by ministers of the said church in any place hitherto used for such purpose, or being now or hereafter duly consecrated or licensed by any archbishop or bishop or other person lawfully authorized to consecrate or license the same, or to affect the jurisdiction of the archbishops or bishops or other persons exercising lawful authority in the Church of the United Kingdom over the said church, according to the rules and discipline of the same, and to the laws and statutes of the realm but such jurisdiction shall remain and continue as if this act had not passed."

certified and registered, and these only; and it enacts that persons officiating in or resorting to those places of worship shall be exempt from all "such" pains and penalties under any act or acts relating to religious \*657] worship as persons were who complied with \*1 stat. 1 W. & M. c. 18. It does not, therefore, introduce any exemption of a different nature from those contained in the prior act, but extends only to statutory penalties; and the jurisdiction of the Ecclesiastical Court is expressly saved by sect. 13. The broad ground on which the present proceeding rests is that a person who has once become a priest of the Church of England cannot divest himself of that character, and throw off obedience to his bishop, by declaring himself a dissenter from the church. He may be exempt from statutory penalties, but he remains bound by his subscription to the three articles set forth in the 36th canon of 1603,<sup>(a)</sup> (1 Gibs. Cod. 148,) and is subject to the provision of the same canon, (2 Gibs. Cod. 897,) that no person shall be suffered to preach, to catechize, or to be a lecturer, in any parish church, chapel, or in any other place within this realm, except he be licensed either by the archbishop, or by the bishop of the diocese, (where he is to be placed,) under their hands and seals, or by one of the two universities: and disobedience to the bishop's order enforcing this canon would be one of the offences enumerated in Ayliffe, Parerg. 208, as ground of deprivation. The 76th canon of 1603, (1 Gibs. Cod. 163,) expressly provides that "No man being admitted a deacon or minister, shall from thenceforth voluntarily relinquish the same, nor afterwards use himself in the course of his life as a layman, upon pain of excommunication. And the names of all such men so forsaking their calling, the churchwardens of \*the parish where they \*658] dwell shall present to the bishop of the diocese, or to the ordinary of the place, having episcopal jurisdiction." And it would be most unreasonable that a person once ordained should be enabled at pleasure to release himself from ecclesiastical obedience by simply declaring that he dissents from the discipline (not the doctrine) of the Church of England, and should at the same time retain the benefit of holy orders, and secure the protection of the acts in favour of non-conformists. The reasoning which established this would show also that a clergyman, by professing dissent, might resume the secular character, and entitle himself to sit in parliament. [COLERIDGE, J. Might a clergyman, situated as this party is, take a donative benefice, which would not require presentation to the bishop of the diocese?] He might; and there would be nothing to prevent his baptizing, marrying, or officiating generally in the church, in another diocese. The church discipline act, 3 & 4 Vict. c. 86, sects. 3, 13, empowers the bishop of any diocese in which "any clerk in holy orders of the United Church of England and Ireland" is charged with an

(a) By the first the candidate for orders asserts the king's supremacy; by the second he recognises the Book of Common Prayer, and promises to use the form prescribed in it and no other; by the third he assents to the Thirty-nine Articles

offence against the laws ecclesiastical, to send the case to the Court of Appeal for the province for hearing and determination. That has been done in the present case. Mr. Shore, being cited as such clerk, appeared, under protest, it is true; but the protest was overruled; and he then put in his answer to the articles, which distinctly showed the nature of the offence, disobedience, not non-conformity. That answer merely re-stated as a defence the matter of the protest; and it was rejected. Mr. Shore did not appeal to the Judicial Committee of the Privy Council against the rejection of the protest or of the \*articles.(a) He has therefore [\*659 admitted the facts on which the jurisdiction depends. That the articles here set forth a charge of disobedience over which the bishop, in the case of a clergyman within his diocese, has jurisdiction, appears from *Trebec v. Keith*, 2 Atk. 498, and *Carr v. Marsh*, 2 Phill. Ecc. Rep. 198. Sir JOHN NICHOLL said in the latter case: "There is jurisdiction then over the place and person, unless the law is altered—it is contended that it is altered by the act of 1812—this statute, however, in my judgment, does not, in the slightest degree, apply to the case—notwithstanding the word 'Protestant' stands without 'dissenter' in one clause(b)—still, taking the preamble and the context together, and especially considering the proviso in s. 3, I am clearly of opinion that it was not intended to alter the laws and discipline of the Church of England—but confined to dissenters. The place here is not a place to be certified under the toleration acts—but a chapel for worship according to the Church of England.—If the act would bear the construction contended for, it would be a complete alteration of the fundamental laws of the Church of England."

Sir F. Kelly, Solicitor-General, *Manning*, Serjt., and Dr. Twiss, contra. This is a question which, at all events, should be reserved for decision on the record. It is, substantially, whether a person once in orders, if he ceases to entertain his first opinions, and becomes a dissenter, [\*660 must, on that account, be perpetually liable to pains and penalties. Mr. Shore, having changed his opinions, proposes to officiate, as a person in orders, in the church of those whose mode of thinking he has adopted. The promoter of this suit prays that he may be admonished not to perform divine service in the chapel without a license, (which he cannot obtain,) and may be canonically punished and corrected, and condemned in costs. If this is authorized by law, a clergyman of the Church of England can no longer have liberty of conscience. [PATTESON, J. Do you say that a clergyman can put off the character by his own voluntary act?] Change of belief is not voluntary. [PATTESON, J. If his belief altered again in a few days, would that restore the character?] It might be so: the question does not arise here. [PATTESON, J. It is difficult to say that character of this kind can be divested by any thing a man does of his own act. Take as

(a) As to the proceedings in the Ecclesiastical Court, Dr. Addams stated some facts not detailed in the affidavits. See *Barnes v. Shore*, 1 Robertson's Ecc. Rep. 382.

(b) Stat. 52 G. 3, c. 155, s. 2.



an instance the character of a barrister.] The character may be indelible in some respects: that of a clergyman may be so for merely civil purposes, as that of sitting in parliament. [COLERIDGE, J. Could a person situated as this party is take a donative, vesting by the act of the patron?] If he accepted such a living, it would appear that the change of opinion did not continue, and there might be a question whether it had ever existed. And, if a person, continuing in secession from the church, accepted a benefice, means would no doubt be found to expel him. That would be a proceeding, not simply to punish, but to deprive, for the prevention of scandal and the preservation of sound religion. But such a person could not, in the first \*661] instance, fulfil the requisites pointed out in 2 Burn's Ecc. L. 224, 225, (9th ed.,) tit. *Donative*, s. 7, §§ 1 to 8. [WIGHTMAN, J. When do you say that Mr. Shore ceased to be a minister of the Church of England within stat. 3 & 4 Vict. c. 86?] When he showed his change of opinion by an overt act. No particular form was necessary. The third responsive allegation establishes that, in point of fact, Mr. Shore has, for ecclesiastical purposes at least, "seceded from and ceased to conform to the Church of England," and that he was, at the time of service of the citation, "a Protestant dissenting minister in holy orders." The fifth responsive allegation states (though perhaps it is not very material) that he has used the service of the church with variations. [PATTESON, J. That would raise a question of fact, which we have nothing to do with.] It might be material as to bona fides. If the variations were colourable only, that, as well as the reality of the dissent in other respects, would be a question of fact for the Ecclesiastical Court. These statements in the responsive allegations have neither been pleaded to nor in any way effectually contradicted. As to the observation that they have been rejected and the rejection not appealed against, if the proceedings show a want of jurisdiction in the court, no appeal was necessary. The question is, simply, whether a clergyman of the Church of England may not superadd to that character the condition of a Protestant dissenting minister, and whether, if the court see, by documents in the cause, that he has bonâ fide dissented, he may not claim the same exemptions as any other dissenter. In *Britton v. Standish*, 6 Mod. 188, S. C. 1 Salk. 166, 3 Salk. 88, it was said \*662] that the Toleration act applied "only to Protestant dissenters, and that the defendant had not shown himself to be one; and this appears to have been a main ground of the decision. The case is no authority as to the common law; for HOLT, C. J., relied on stat. 1 Eliz. c. 2. In the *Anonymous* case in *Skinner*, 101, the party cited appears not to have been a dissenter. In *The Chamberlain of London v. Evans*, 2 Burn's Ecc. L. 207, 218,(a) that was shown; and Lord MANSFIELD said: "The common law of England, which is only common reason or usage, knows of no prosecution for mere opinions." "Bare non-conformity is no sin by the common law: and all positive laws, inflicting any

(a) S. C. as *Harrison v. Evans*, 3 Bro. P. C. 465.



pains or penalties for non-conformity to the established rites and modes, are repealed by the act of toleration; and dissenters are thereby exempted from all ecclesiastical censures." There a party had been fined in the Sheriff's court, under a by-law of the Corporation of London, for refusing to serve the office of sheriff, though he pleaded that he was a Protestant dissenter and could not conscientiously take the sacrament according to the rites of the Church of England, (which persons assuming the office were bound to do,) and claimed exemption from penalties under the Toleration act: but the judgment was reversed on appeal: and, the case being carried ultimately to the House of Lords, the reversal was affirmed, evidently on the ground that, on the first principles of the common law, a man ought not to be compelled to act against his religious faith. *Trebec v. Keith*, 2 Atk. 498, is clearly inapplicable, because there the party cited, not only was a clergyman of the Church of England, but was acting in that capacity, and not professing to have become a dissenter. So in *Carr v. Marsh*, 2 Phill. Ecc. Rep. 198, the chapel was a place "for worship according to the Church of England:" (p. 204:) there was no pretence that it was a meeting-house of dissenters, or a place requiring certificate. [PATTESON, J. Suppose the object of this suit was only deprivation: would the form of proceedings be different from that used here? And, if not, would not it be premature to prohibit? Where the proceedings, as far as they have gone, would be right if adopted for a particular object, but wrong if for another, we have several times deferred granting a prohibition till we could know what the ulterior proceeding would be.] The proceedings here show that deprivation is not the object. The accusation is not one that calls for it; and the prayer in the tenth Article requires a monition to abstain from publicly officiating in the chapel without license, canonical correction according to the nature of the offence, and condemnation in costs, but not deprivation.(a) [PATTESON, J., referred to *Free v. Burgoyne*, 5 B. & C. 400.] [\*663]

The charge on which this suit proceeds is, essentially, non-conformity, within the meaning of the remedial statutes. The supposed offence is denying that a license from the bishop is necessary for the performance of service in an unconsecrated chapel frequented by a certain congregation; and following up that denial by officiating in the chapel without license. This comes fully within the description of non-conformity in 4 Bla. Com. 51—\*54, and is totally different from the mere withholding of clerical obedience. The accused may be still termed a clergyman of the Church of England; but that is not equivalent to his being a clerk in holy orders of the United Church of England and Ireland, the expression used in the present articles, and in stat. 3 & 4 Vict. c. 86, s. 3, upon which now depends the power of correcting persons in orders for disobedience and other offences subject to the ecclesiastical jurisdiction. [\*664]

(a) Dr. Addams here insisted that, on the proceedings as they stood, the Ecclesiastical Court might deprive.

tion. A person ordained by either of the archbishops or by the Bishop of London, &c., under stat. 59 G. 3, c. 60, s. 1, to officiate in the colonies, cannot, by sect. 2, receive any benefice or promotion, or act as a curate, in Great Britain or Ireland, without a special written consent of the bishop; in that instance, a person might be a clergyman of the Church of England without being a clerk in holy orders of the United Kingdom. The persons so designated in the act of Victoria must not only have received orders from a bishop of the church, but remain in its communion. The act 1 stat. 1 W. & M. c. 18, s. 4, protects all persons, taking the oaths and making the declaration, from ecclesiastical prosecution for "non-conforming to the church." That extends, in terms, to clergymen as well as laymen; and it is well known, from the history of this country after the Restoration, that the clergy stood in need of such protection at least as much as the laity. The generality of sect. 4 is not qualified by sect. 8. If it were, Mr. Shore could not even attend an unlicensed chapel, as a layman might, without incurring a penalty. What was meant by non-conforming is evident from the statutes recited in 1 stat. 1 W. & M. c. 18. At first, and particularly under stats. 1 Eliz. c. 2, \*665] 23 Eliz. c. 1, \*29 Eliz. c. 6, 35 Eliz. c. 1, the offence was considered under the form of recusancy; the wilful desertion of the established worship. After the Restoration, new laws were passed, to restrain and punish variations from the established doctrine and discipline by persons within the church: of this class of enactments were stats. 13 & 14 Car. 2, c. 4, and 17 Car. 2, c. 2. Preaching without license is forbidden by stat. 13 & 14 Car. 2, c. 4, sects. 19, 21, and is a non-conformity according to the strict sense of the later statutes. Stat. 17 Car. 2, c. 2, (called the Five Mile Act,) was "for restraining non-conformists from inhabiting in corporations:" and it recited, in sect. 1, that "divers parsons, vicars, curates, lecturers, and other persons in holy orders have not declared their unfeigned assent and consent to the use of all things contained and prescribed in the Book of common prayer," &c., or subscribed the declaration contained in stat. 13 & 14 Car. 2, c. 4; and that "they or some of them, and divers other person and persons not ordained" according to the Church of England, and having taken upon them to preach in unlawful conventicles, &c., have settled themselves in corporations; and it then proceeds to impose on them certain regulations and penalties. Here irregular preaching, even by persons in orders, is treated as non-conformity. The term "conformity" is applied to preaching in the 54th canon, (1 Gibs. Cod. 310,) headed "The licenses of preachers refusing conformity, to be void," which enacts, that, "if any man licensed heretofore to preach, by any archbishop," &c., "shall at any time from hence-  
\*666] forth refuse to conform himself to the laws, ordinances, and rites ecclesiastical established in the Church of England, he shall be admonished by the bishop" or ordinary "to submit himself to the use and due exercise of the same. And if, after such admonition, he do not con-

form himself within the space of one month," his license is to be void. The Latin version of "preachers refusing conformity in this canon, is "concionatores schismatici,"(a) and there is no doubt that the effect of the Toleration act was to exempt schism in the church as well as dissent generally from the existing penalties. The intent and operation of the act were fully considered by Sir JOHN NICHOLL in *Kemp v. Wickes*, 3 Phill. Ecc. Rep. 264;(b) and his views agree with those now taken. No instance has been cited of an ecclesiastical prosecution like this, for *bonâ fide* dissent. The 38th canon of 1603, (1 Gibs. Cod. 289,) headed, "Revolters, after subscription, censured," enacts that, "if any minister, after he hath once subscribed to the said three articles" (the articles to be signed before ordination, according to canon 36, *antè*, p. 657,) "shall omit to use the form of prayer, or any of the orders or ceremonies prescribed in the communion book," he is to be suspended, and, if after a month he do not reform and submit himself, excommunicated, and, if for another month he do not submit himself, deposed from the ministry." But the Latin word in the heading of this canon, corresponding to "revolters," is "prævaricantes,"(c) which means, not finally dissenting, but playing fast and loose with the articles; affecting to observe them, but really acting in opposition to them. Thus, if he performed the Church of England service in a morning and a dissenting service in the afternoon, it would be a scandal requiring suppression, and not a *bonâ fide* dissent. In the case of papists, stat. 31 G. 3, c. 32, s. 3, expressly enacts that "no person professing the Roman catholic religion," who shall take the oath under that act, shall be prosecuted under any of the acts (of Elizabeth and James I.) there recited, "or shall be prosecuted in any ecclesiastical court" for not repairing to his parish church, &c., to hear divine service, &c., according to the forms and rites of the Church of England. If Mr. Shore had joined the Church of Rome, he would have been protected by this act: and it cannot have been intended to confer greater immunities in such a case than are given to a person dissenting but continuing a Protestant. Mr. Shore is not excluded from the benefit of stat. 52 G. 3, c. 155, by sect. 13, which saves the ecclesiastical jurisdiction. The earlier part of that act relates principally to the use of certain places of worship on condition of their being certified and registered; then sect. 13 provides that nothing in the act shall be construed to affect the celebration of divine service according to the Church of England, by ministers of that church, "in any place hitherto used for such purpose, or being now or hereafter duly consecrated or licensed by any archbishop or bishop," &c.: and the section continues; "or to affect the jurisdiction of the archbishops or bishops," &c., "over the said church, according to the rules and discipline of the same." That refers

(a) Collection of Articles, &c. London. 1684. p. 294.

(b) Dr. Twiss referred to pp. 297—299.

(c) Collection of Articles, &c., p. 287.

to jurisdiction over the subject matter of the previous enactment in sect. 13, and not to the general authority in respect of ecclesiastical prosecutions.

*Cur. adv. vult.*

\*668] \*Lord DENMAN, C. J., in this term, (May 4th,) delivered the judgment of the court.

This was a rule for a writ of prohibition to the Arches Court of Canterbury from proceeding in a suit instituted by Ralph Barnes, gentleman, against the Rev. James Shore, in the Court of the Bishop of Exeter, and removed by letters of request into the Arches Court, for officiating in an unconsecrated chapel, at Bridgetown in the diocese of Exeter, without the license and against the monition of the bishop of that diocese. Mr. Shore had been admitted to priest's orders some years ago, by a former Bishop of Exeter, and had officiated in the chapel in question, with the license of the present bishop, for some years: but that license had been withdrawn; and the chapel had been registered in due form under the statute 52 G. 3, c. 155, as a dissenting chapel: and Mr. Shore officiated in it, professing to officiate as a dissenting minister.

Mr. Shore being a priest in holy orders, the general jurisdiction of the bishop of the diocese in which he does any act relating to religious worship is undoubted. The cases of *Trebec v. Keith*, 2 Atk. 498, and *Carr v. Marsh*, 2 Phill. Ecc. Rep. 198, are abundantly sufficient to establish this position without minute examination of the canons on the subject. And, in the last edition of Burn's Ecclesiastical Law, a case is stated from Serjt. Hill's MSS., of *Keate v. Bishop of London*, 1 Burn, Ecc. L. 306 a, 9th ed., in which this court discharged a rule for a prohibition, where Mr. Keate was sued in the Ecclesiastical Court for officiating without the bishop's license. And the questions, whether the charge brought against

\*669] \*Mr. Shore can or cannot be substantiated, and, if substantiated, what penalty he may have incurred, are not to be inquired into in this court. The only question for us is, whether, by any act of parliament, Mr. Shore is, under the circumstances, exempted from the jurisdiction of the bishop.

It appears that he put in a defensive allegation, stating the facts, and claiming exemption as a dissenter, which allegation the learned Judge of the Court of Arches refused to receive: and such refusal raises the question for our consideration.

The statute mainly relied on is 52 G. 3, c. 155. That statute provides for the certifying and registering places of religious worship, and then provides, by sect. 4, that every person who shall teach or preach at or officiate in or resort to such place "shall be exempt from all such pains and penalties under any act or acts of parliament relating to religious worship, as any person who shall have taken the oaths, and made the declaration prescribed by and mentioned in an act, made in the first year of the reign of King William and Queen Mary, intituled *An act for exempting their Majesties' Protestant subjects dissenting from the Church*

*of England from the penalties of certain laws*, or any act amending the said act, is by law exempt" from, "as fully and effectually as if all such pains and penalties, and the several acts enforcing the same, were recited in this act, and such exemptions as aforesaid were severally and separately enacted in relation thereto." This clause manifestly does not touch the present case. It exempts only from penalties under certain acts of parliament. The present suit is not founded on, and has no relation to, any penalty under any act of parliament at all, but is a suit in the \*Ec- [\*670  
clesiastical Court, founded on the common law of the land.

There is a clause in 1 stat. 1 W. & M. c. 18, (s. 4,) which prohibits proceedings in the Ecclesiastical Court under the circumstances there stated: but stat. 52 G. 3, c. 155, does not incorporate that clause nor allude to it. The 13th section of stat. 52 G. 3, c. 155, was referred to on the argument as saving the jurisdiction of the bishop; but it relates principally to places consecrated or licensed by the bishop, and does not bear upon the present question.

From an attentive consideration of all the clauses of this act, 52 G. 3, c. 155, it is quite plain that it does not exempt any person from a suit in the Ecclesiastical Court to which he would otherwise be liable. But the statute 1 stat. 1 W. & M. c. 18, remains to be considered. That statute clearly exempts from the penalties of the acts of parliament then in force as to public worship all persons dissenting from the Church of England who shall take the oaths mentioned in the first chapter of that session, (the oaths of allegiance and supremacy,) and make the declaration mentioned in 2 stat. 30 C. 2, c. 1, (the declaration against transubstantiation and invocation of saints:) and the 4th section further enacts: "nor shall any of the said persons be prosecuted in any Ecclesiastical Court, for or by reason of their non-conforming to the Church of England." The 8th section also exempts persons dissenting from the Church of England in holy orders, or pretended holy orders, or pretending to holy orders, and preachers and teachers of congregations of dissenting Protestants, who shall take such oaths and make such declaration, from the penalties of certain acts of parliament; but it is silent as to proceedings in any Ecclesiastical Court.

\*Upon the whole, therefore, it appears that the only clause in [\*671  
any act of parliament which exempts any persons from proceedings in the Ecclesiastical Court is the 4th section of 1 stat. 1 W. & M. c. 18, and that only from proceedings for or by reason of their non-conforming to the Church of England. In order to avail himself of the protection of this clause, Mr. Shore must show, first, that he is a person dissenting from the Church of England who has taken the oaths of allegiance and supremacy and made the declaration against transubstantiation: secondly, that he is sued in the Ecclesiastical Court for or by reason of his non-conforming to the Church of England. As to the first, some question may be made whether the proper oaths have been taken; but it is hardly necessary to

inquire closely into that point. No distinct rule appears to be laid down as to who may be properly said to be persons dissenting from the Church of England: but it should seem that, as dissent is matter of opinion, any one who says that he does dissent is entitled to be treated as a dissenter, and that whether he be in holy orders or a layman. Mr. Shore, therefore, may be entitled to insist upon being treated as a dissenter upon his mere assertion that he is so, without any formal act of separation being necessary, either by him or against him. But he cannot so divest himself of the character of a priest in holy orders, with which he has been clothed by the authority of the Church of England when he was ordained by one of her bishops, and when he vowed and promised canonical obedience to that church: from that character and that vow and promise he can be released only by the same authority which conferred the one and enjoined and received the other. The 76th \**canon*(a) provides, in express terms, \*672] that "No man being admitted a deacon or minister, shall from thenceforth voluntarily relinquish the same, nor afterwards use himself in the course of his life, as a layman, upon pain of excommunication:" and the churchwardens shall present him. Therefore, although he may, as a dissenter, be exempted by the 4th section of 1 stat. 1 W. & M. c. 18, from being sued in the Ecclesiastical Court for mere non-conforming to the Church of England, he is not exempt by that or any other act from canonical obedience to the bishop, as a priest, in regard to any thing that he may do according to the rites and ceremonies of the Church of England.

This brings the whole matter to the second and last point, whether he is sued in the present instance for non-conforming to the Church of England, or for breach of discipline as a priest of that church. Now the 7th article exhibited in the Arches Court makes that matter perfectly clear; for it charges that Mr. Shore, on Sunday the 14th of April, 1844, and on Sunday the 28th July, 1844, did take upon himself publicly to read prayers, preach, administer the Holy Sacrament of the Lord's Supper, and perform ecclesiastical duties and divine offices, according to the rites and ceremonies of the United Church of England and Ireland, in an unconsecrated chapel or building in the diocese of Exeter, without any license or authority for so doing, and contrary to and in spite of the injunction or monition of the Bishop of Exeter. No one can fail to see that this is not a charge for non-conforming to the Church of England. The previous articles had charged that he was a priest in holy orders, ordained by a former Bishop \*673] of Exeter; and the 7th \*article manifestly charges that, being such priest, he performed the services and duties proper to such priest according to the rites and ceremonies of the Church of England, but in a place, and under circumstances, which made such performance a breach of the discipline of that church; and that he is sued for such breach of discipline. Whether facts can be proved which will establish that charge, it is not for us to inquire. Mr. Shore has denied the charge; and the

(a) 1 Gibb. Cod. 163.



Ecclesiastical Court will doubtless make the proper inquiry into the truth of it. It is sufficient for the purposes of this motion for a prohibition that we see that the charge is one peculiarly and exclusively of ecclesiastical jurisdiction, and that no act of parliament exempts a person situated as Mr. Shore is from that jurisdiction in respect of such charge.

Rule discharged.

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**CHAPMAN against RAWSON and BLYTON. Wednesday, April 18th.**

To a declaration in trespass defendant pleaded a justification, setting up an affirmative right in himself, which right the replication traversed. At the trial, the plaintiff's counsel claimed the right to begin. The judge asked whether he would undertake to proceed for substantial damages, and, on counsel declining so to undertake, allowed the defendant to begin. *Held correct.*

**TRESPASS** for breaking and entering plaintiff's close, and cutting down and destroying a dam of the plaintiff, and floodgates, &c. Plea: that defendant Rawson was occupier of a water-mill; and that the water of a stream of water and watercourse had run and flowed, and had been used, &c., and of right ought, &c., without obstruction or hindrance, to the said mill, to supply the same with water: and, because plaintiff's [\*674  
dam, floodgates, &c., were standing across the stream, higher up than the mill, obstructing and hindering the water from running, &c., in so free, &c., a manner as it was before used, &c.: justification by Rawson in his own right, and Blyton as his servant, of the acts in the declaration, as done to abate the obstructions, &c.

Replication, denying that the water had run and flowed, or been used, &c., or of right, &c., modo et formâ. Issue thereon.

There was another plea, by which Blyton alleged his own occupation of another mill, and justified in his own right, and Rawson justified as his servant: upon which a similar traverse was taken.

On the trial, before TINDAL, C. J., at the last Lincolnshire assizes, the plaintiff's counsel claimed the right to begin, on the ground that the damages were to be ascertained. The Lord Chief Justice asked the learned counsel whether he would pledge himself to go for substantial damage, and, upon his declining to do so, allowed the counsel for the defendants to begin. Verdict for defendants.

*Whitehurst* now moved for a new trial on the ground of misdirection. In *Mercer v. Whall*, 5 Q. B. 447, it was decided that, if there be any thing which the plaintiff has to prove, he is entitled to begin. The damages here, properly speaking, required proof, although the counsel for the plaintiff did not undertake to set up a case for substantial damages. [PATRICKSON, J. You would have claimed a verdict if no evidence had been offered on either side.] That criterion is not adopted in *Mercer v. Whall*.

\*Lord DENMAN, C. J. The most simple rule, in the case of a record like this, would be to say that the affirmative issue lay on [\*675

the plaintiff, to the extent of the damages claimed by him. That would be of easy application. But, if his counsel will not undertake to offer proof of substantial damages, it is reasonable to say that no affirmative issue lies upon him.

PATTESON, J. If damages be out of the question, there is no doubt that the issue here is on the defendants.

WILLIAMS and WIGHTMAN, Js., concurred.

A rule nisi for a new trial was afterwards granted on another point.

**STICKLAND against MANSFIELD and Another. *Thursday, April 16th.***

A check is sufficiently dated to satisfy the exemption clause, sect. 15, of the Stamp Act, 9 G. 4, c. 49, if it bear date, "Dorchester Old Bank," and there be in fact a bank so called, in the town of Dorchester, and there be no proof that the check was drawn elsewhere than at Dorchester.

THIS was an action for money had and received, to which the defendants pleaded, among other things, a check given by them and received by plaintiff in satisfaction. On the trial, before ROLFE, B., at the last Spring assizes for Dorsetshire, the check was put in, being, in form, as follows.

"Dorchester Old Bank. Established 1786.

"Messrs. Williams, Cox and Williams. Pay to G. J. Stickland, Esq., or bearer, eight pounds, nineteen shillings and sevenpence.

"For self and Andrews.

WM. MANSFIELD."

"£8. 19s. 7d.

\*676] \*The office of the Dorchester Old Bank was in the town of Dorchester. The check was unstamped. For the plaintiff it was objected that the instrument was void on that account, because the place of issuing was not sufficiently specified to bring it within the exemption of stat. 9 G. 4, c. 49, s. 15, which enacts that all orders for payment of money to the bearer on demand, and drawn in any part of Great Britain, upon any banker or bankers who shall reside or transact business "within fifteen miles of the place where such drafts or orders shall be issued," shall be exempted from stamp duty, "provided the place where such drafts or orders shall be issued shall be specified therein," and provided they shall bear date on or before the day of issuing. The learned judge, however, admitted the check as evidence; and the defendants had a verdict.

Cockburn now moved for a new trial. The date ought to have been Dorchester. The words "Dorchester Old Bank" are not equivalent. They only describe the establishment, and do not necessarily import that the check was drawn at Dorchester, though the bank was, in fact, situated there. [WIGHTMAN, J. Supposing that the party drew it in the office, how should he have dated it?] Dorchester. [WIGHTMAN, J. He writes

that, and more.] The bank might have been one formerly established at Dorchester, and named accordingly, but removed, and still keeping the name.

LORD DENMAN, C. J. The date may be a date of place; and, if so, the check appears to have been drawn at Dorchester; and you do not show the contrary. There is no ground for a rule.

\*PATTESON, J., concurred.

WILLIAMS, J. The date names Dorchester; and the other [\*677 words do not hurt.

WIGHTMAN, J., concurred.

Rule refused.

**MARY ROWLES against SENIOR, Esquire, GANDELL and CHESHYRE. Thursday, April 16th.**

G. recovered judgment in an action of debt against D., and employed his attorney (to whom he had previously assigned the debt in repayment of advances) to sue out execution. The attorney, who lived at Cheltenham, caused a *fi. fa.* to be sued out, directed to the sheriff of Buckinghamshire, to levy on D.'s goods; and the attorney's London agent endorsed on the writ: "The defendant resides at Wolverton, and is an innkeeper. Levy," &c. D. was, at the time, residing with his mother-in-law, at an inn, of which she was the proprietor, at Wolverton, and was assisting her in the management, but had no interest in the premises or the goods upon them. The sheriff, in execution of the *fi. fa.*, seized goods of the mother-in-law at her inn. She brought trespass against the attorney, and obtained a verdict upon issues joined on pleas of Not Guilty, and denial of her property in the house and goods. On motion to enter a verdict for defendant,

*Held*, that the verdict against the attorney on the issue of Not Guilty was maintainable, the facts furnishing evidence that he had directed the sheriff to levy on plaintiff's goods.

TRESPASS for breaking and entering plaintiff's messuage, &c., continuing therein, &c., and seizing, taking and converting her goods and chattels, described in the declaration.

Pleas, by defendant Chesshyre. 1. Not guilty. Issue thereon. 2. As to the breaking and entering, &c., and continuing, &c., that the messuage was not, at the times when, &c., the messuage of plaintiff in manner and form, &c. Issue thereon. 3. As to seizing, &c. and converting the goods and chattels, that the said goods and chattels were not, nor were any, &c., at the time when, &c., the goods and chattels of plaintiff, in manner, &c. Issue thereon.

The defendant Senior pleaded similar pleas, on which \*issues [\*678 were joined. Gandell suffered judgment by default.

On the trial, before PATTESON, J., at the Buckinghamshire Spring assizes, 1845, it appeared that the alleged trespass was committed in executing a *testatum fi. fa.* in an action of *Gandell v. Robert Dore*. Of the now defendants, Gandell was the plaintiff in that action, Chesshyre his attorney, and Senior the sheriff, charged with execution of the process. At the times when the *fi. fa.* issued and was executed, Mrs. Rowles, the now plaintiff, kept an inn, called the Ratcliffe Arms, at Wolverton; and Dore, her son-in-law, resided with her, (his family also living in the house,) and

assisted her in managing the business ; but it did not appear by the evidence that he had any share in it. He had taken the premises for her, and kept the inn for some time, before she took possession of it. Gandell, having, in November 1843, recovered judgment against Dore, in an action of debt, employed Chesshyre (who carried on business at Cheltenham) to sue out process of execution, which he did, by his agent (Manning) in London. The fi. fa. was against the goods of Robert Dore, and directed to the sheriff of Buckinghamshire, and was endorsed, by the agent, as follows.

“ The defendant resides at Wolverton, in the county of Bucks, and is an innkeeper. Levy 177*l.* 9*s.* 1*d.*, with interest as within mentioned, together with 1*l.* 15*s.* 4*d.* for costs of execution, besides, &c.

“ JOHN MANNING, Dyer’s Buildings, Holborn,  
“ For Charles John Chesshyre of Cheltenham, in the county of Gloucester.”

Chesshyre delivered the writ so endorsed to Senior ; and he, on November 28th, 1843, took in execution the goods of Mrs. Rowles at the Ratcliffe Arms Inn, supposing\* them to be Dore’s. It appeared further that, in an affidavit subsequently made by Chesshyre, in the action *Gandell v. Dore*, (and produced on the plaintiff’s behalf at the present trial,) Chesshyre deposed that Gandell had, on 8th August, 1843, assigned to him, Chesshyre, certain book debts, among which was the above debt from Dore, to have and receive the same and pay himself thereout, advances to the amount of 100*l.* to be made by him, Chesshyre, to Gandell.

It was contended, for the defendant Chesshyre, that, in delivering the fi. fa. to the sheriff, he had done nothing which could render him liable for the trespass ; and *Jarmain v. Hooper*, 6 M. & G. 827, and *Sowell v. Champion*, 6 A. & E. 407, were cited. PATTESON, J., thought that the special direction on the fi. fa. materially distinguished the present case from those cited : he therefore ruled this point against the defendant, but reserved leave to move to enter a verdict for him ; and the jury found a verdict for the plaintiff against Senior and Chesshyre, with 40*s.* damages.

*O’Malley*, in Easter term, 1845, obtained a rule to show cause why a verdict should not be entered for Chesshyre.

*Pashley* and *D. Power* now showed cause. *Jarmain v. Hooper*, as far as it bears on this case, is an authority against the defendant. TINDAL, C. J., says there : (a) “ The attorney has the general conduct of the cause ; he is the only person with whom the sheriff has communication ; and, in taking a step essentially necessary for the benefit of the client, that is, for the obtaining the fruit of his judgment, we think he cannot be \*held to have acted beyond his authority, though he has miscarried in its execution. And, when it is argued that he cannot be his agent in giving *false* information, the answer is, that, if his agent to

(a) 6 Man. & G. 850.

do the particular act, the client must stand to the consequences if he act inadvertently or ignorantly." The effect of that judgment was, not that the attorney was exempt, (which no one asserted,) but that the client was answerable. In *Sowell v. Champion*, 6 A. & E. 407, 417, where the attorneys were held not liable, the court said: "The attorney, who places a writ for execution in the hands of an officer, does a lawful act, though he may be fully persuaded that the officer will be likely to execute it in some particular place which may turn out, upon inquiry, to be out of his jurisdiction. The attorney's opinion upon such a point is immaterial, unless he induces the officer to act upon it. He is not bound to form any: the officer must, at his peril, act where he has the power. We think that the circumstances of the case go no further than to show that, when the attorney gave the precept, he thought it would be executed at the plaintiff's house, without directing or authorizing it." The question therefore is, in such cases, whether the attorney has done any thing to cause the irregularity complained of. The defendants there had omitted to make an inquiry which would have prevented the injurious act; but, not having done any thing wrongful, they were exempted from liability. Here the defendant Chesshyre committed a wrongful act, by causing to be endorsed on the writ a direction which was untrue and led the sheriff to make an unlawful seizure. The rule of exemption, therefore, does not apply, even if the court lay out of consideration the personal interest on which the defendant acted, independently of his duty [681 as an attorney. In *Sedley v. Sutherland*, 3 Esp. N. P. C. 202, where the attorneys and clients were sued together for a false imprisonment, Lord KENYON thought the action would not lie against the attorneys, "unless it could be proved that they had gone beyond the line of their duty, by which the plaintiff had suffered. That it would be a case of infinite hardship if an attorney, who was instructed to use the most effectual means to secure parties suspected, should be subject to actions of trespass, in the fair discharge of his duty." But (supposing that the facts of the present case made these remarks applicable) the court, in *Green v. Elgie*, 5 Q. B. 99, 113, has rejected the distinction, suggested between attorney and client, and laid down the law as to attorneys with more strictness.

*O'Malley*, contra. It is not disputed, on the defendant's part, that the attorney, in a case of this kind, stands upon the same footing of liability with his client; nor that, if an attorney, without a valid judgment, or under other circumstances of irregularity, delivers process to the sheriff against A., under which his person or goods are illegally taken, the attorney is liable: *Codrington v. Lloyd*, 8 A. & E. 449, and *Green v. Elgie*, 5 Q. B. 99, are cases of this class. But there is a distinction, recognised in *Sowell v. Champion*, 6 A. & E. 407, and other cases, where the attorney has taken out process regularly, and given it to the sheriff without any improper direction, and he does something not authorized by the pro-

\*682] cess. Here the \*writ was against Dore's goods, not those of Rowles ; and the endorsement did not direct the sheriff to seize goods of Rowles, or any goods at the Ratcliffe Arms ; a description of the party to be levied upon was necessary by the rule of court, Hil. 2 & 3 G. 4 ;(a) and the endorsement merely described Dore as residing there and being an innkeeper, which was his real occupation. He was not described as proprietor of the Ratcliffe Arms ; and he was not a mere servant. In *Jarmain v. Hooper*, 6 M. & G. 827, the question raised by the pleadings, and on which the decision turned was, whose goods the sheriff was actually commanded to seize. If the defendant here, intending the sheriff to seize Dore's goods, gave information which misled him, that does not make the defendant liable in trespass. For that purpose, an express command by him, or at least an assent to the act done, should have been proved. Here no such fact appeared. [PATTESON, J. Your argument would show that the plaintiff Gandell was not properly liable.] It goes that length. The sheriff, if he receives mere information from the attorney, is bound to ascertain that it is correct ; if the attorney, in such a case, runs the risk of becoming a trespasser, he ought always to be a party to the interpleader rule where the execution is contested in that form. In *Sowell v. Champion*, 6 A. & E. 407, the facts appear to have been stronger against the attorneys than in this case ; and their act cannot have been confined to a mere handing of the writ ; there must have been an endorsement by them, containing the name and residence \*683] of the defendant, according to the rule of court, Hil. \*2 & 3 G. 4 ;(a) and this was noticed in argument by their own counsel. The rule would be a trap for persons issuing process, if a mere error in the endorsement could make them liable as trespassers.

LORD DENMAN, C. J. The principle of *Sowell v. Champion*, 6 A. & E. 407, extends only to this, that the attorney is not a trespasser unless he actually directed the wrong goods to be seized, or seizure to be made in a wrong place. The whole question here is, whether the attorney did so ; and I think he did. By the endorsement, he, in effect, desires the sheriff to go to an inn at Wolverton, kept by Dore, to make the required levy. He leads the sheriff to believe that Dore is the master and owner of the house in question ; and the levy is accordingly made there. My conclusion on this point is greatly strengthened by the fact that the defendant had become assignee of the debt, and was to take the fruits of the levy. This case does not bring the rule of law into question, but only its application.

PATTESON, J. The only question is, whether the defendant Chesshyre directed those goods to be seized which are the subject of the action. He was a stranger to the act of trespass itself ; and the endorsement on the fi. fa. was not actually in his writing ; but the circumstances are these. The debt for which the levy was made had been assigned to the defend-

(a) 5 B. & Ald. 560.



ant. He acted as attorney in suing out the process. A fi. fa. against the goods of Dore was sent down from London, endorsed by Chesshyre's agent with a description of Dore as residing at Wolverton, and being an inn-keeper. He \*did in fact reside at Wolverton, and at an inn: but the goods there were the property of his mother-in-law. He may [\*684 have had more interest in the establishment than the plaintiff admits: but the question of property is decided by the verdict; and the remark goes no farther than to strengthen the supposition that Gandell and Chesshyre meant the goods to be seized at the Ratcliffe Arms which in fact were seized there. Dore resided at no other place in Wolverton than that. Then, the only question being whether the defendant Chesshyre took a part in directing the levy on the plaintiff's goods, I think that was rightly decided at the trial.

WILLIAMS, J. There is no doubt that the endorsement must be taken to have been Chesshyre's. Then, did he direct the sheriff to levy upon the wrong goods? In *Sowell v. Champion*, there was not any misdirection in fact by the attorneys: if there was a wrong intention, it did not break out in any act. Here the defendant gave certain directions to the sheriff as to the levy; and, under those, the sheriff took the wrong goods. In each case it was a question on the evidence: and I agree that the result here is right.

WIGHTMAN, J. The only question here is, whether the attorney caused the plaintiff's goods to be seized. The language of the endorsement could be taken only in one way. It stated Dore to be an innkeeper residing at Wolverton: and Dore is found residing at an inn at Wolverton, but in an equivocal situation: it appears by the evidence that he was not the proprietor; but the sheriff might well be led by the endorsement to suppose that he was the real innkeeper, and, in that belief, to seize the goods in question. The action, therefore, was well sustained. [\*685

Rule discharged.(a)

(a) See *Rundle v. Little*, 6 Q. B. 174; *Cooper v. Harding*, 7 Q. B. 928.

### LEWIS against SAMUEL. Friday, April 17th.

Plaintiff, an attorney, undertook a prosecution for perjury on defendant's behalf, and agreed not to charge him full costs, except money out of pocket. He disbursed 105*l.* towards carrying on the proceedings, but, by negligence, preferred a defective indictment, and, in consequence, the prosecution failed.

*Held*, that he could not recover against defendant for the disbursements.

Defendant, in the course of the proceedings, advanced plaintiff 100*l.* for carrying them on; and he applied it accordingly. *Held*, that, in an action by plaintiff for professional charges and disbursements, defendant could not set off the 100*l.* as money received by plaintiff to his use.

ASSUMPSIT for work and labour, money paid, and on an account stated  
Pleas: 1. Non-assumpsit. 2. Payment. 3. Set-off, for money received

by plaintiff to defendant's use, and on an account stated. Replication, joining issue on the first, and traversing the second and third, pleas.

On the trial, before WIGHTMAN, J., at the sittings in Middlesex after last term, it appeared that the plaintiff, an attorney, brought this action for professional fees and expenses, and for his disbursements in a prosecution conducted by him on defendant's behalf against one Isaacs, for perjury. The plaintiff had given the now defendant a written agreement as to that proceeding, as follows. "I hereby undertake not to charge you full costs in the prosecution of this indictment, except the money out of pocket." The case came on for trial: and Isaacs was acquitted because the indictment, alleging the perjury as committed in an affidavit, misstated the name of the commissioner before whom it was sworn. The \*686] now defendant had himself furnished the plaintiff with 100*l.* towards the expenses of the prosecution, and they had been applied to that purpose: but the plaintiff had advanced out of pocket 105*l.* more, which was part of the sum now claimed. The defendant's counsel contended that the plaintiff could not recover any expenses of the prosecution, having rendered them useless by gross negligence. For the plaintiff it was urged that he might at any rate recover the 105*l.* paid out of pocket, under the above contract. The jury were of opinion that the plaintiff had been guilty of gross negligence: and the learned judge thereupon directed them to deduct the 105*l.* from his demand, but gave leave to move to increase the damages that might be found for the plaintiff by that amount. The defendant claimed to set off the 100*l.* paid by him against any sum to which the jury might think the plaintiff entitled; but the learned judge held that this could not be done; and the plaintiff had a verdict for 38*l.* on a part of his demand not now in dispute.

*Watson* now moved for a rule to show cause why the damages should not be increased by 105*l.* This sum is not demanded for service, but for moneys actually paid under contract for the repayment, as in *Jones v. Nanney*, 1 M. & W. 333; S. C. Tyr. & G. 634. [Lord DENMAN, C. J. But paid so as not to do any good. Is there any real distinction, in such a case, between money and that which is charged for as money's worth? If the labour is to be lost, why not the money? PATTESON, J. Does the action for money paid lie for money paid uselessly?] It was money paid \*687] to the defendant's use at first, and before any fault was committed. [Lord DENMAN, C. J. The argument here would apply to every case where an attorney's bill is disputed on the ground of negligence. There is always some money out of pocket. WIGHTMAN, J. Suppose a mechanic lays out money on the making of a carriage or an engine, and it proves useless: can he claim for the materials?] On such a contract as this he might. At any rate the defence must be specially pleaded. [PATTESON, J. You would contend that, if he had brought witnesses, and taken them away on the eve of the trial, he might still recover the expense of bringing them. The mismanagement would perhaps be ground for a

cross action; though it might, indeed, be contended that the attorney, having no remuneration for his labour, is like a bailee without reward. [WIGHTMAN, J. It may be an advantage to him to do the work.] *Templer v. McLachlan*, 2 New Rep. 136, is an authority for the plaintiff. In *Hill v. Featherstonhaugh*, 7 Bing. 569, and *Shaw v. Arden*, 9 Bing. 287, the charges which the attorney was precluded from recovering because they had proved fruitless were for services, not disbursements.

LORD DENMAN, C. J. I think there was not the slightest difference between the money laid out and the work and labour. No rule can be granted.

PATTESON, J. I am of the same opinion. The attorney is employed, not simply to pay money, but to conduct the cause, and to decide whether particular payments are necessary or not.

WILLIAMS and WIGHTMAN, Js., concurred.

Rule refused.

\**M. Chambers*, on a subsequent day of the term, moved (a) (by leave reserved at the trial) for a rule to show cause why a verdict should not be entered for the defendant. The set-off ought not to have been excluded; and, if allowed, it leaves the plaintiff debtor. [WIGHTMAN, J. Suppose, in the building of a house, the employer advances money to the builder, which he lays out upon the work, but it is done so badly as to be of no use: will an action lie for money had and received?] This is the ordinary case of an action for money advanced upon a consideration which has failed. It is as if the defendant had said: I give you 100*l.*, provided you will disburse it skilfully and carefully. [WIGHTMAN, J. The plaintiff may have done so to the extent of 100*l.*; but, in consequence of neglect afterwards, the expenditure may have failed of its object.] The money was furnished for the purpose of preferring an indictment: it was preferred, but with a wrong statement of name, which made the whole proceeding useless. The employer may recover his money back. [PATTESON, J. After it has been paid out of the attorney's hands? He may have employed it with skill and care down to the time of preferring the indictment: but you say he is still to repay it, because he has made a blunder.]

*Cur. adv. vult.*

LORD DENMAN, C. J., on a subsequent day of the term, (April 25th,) said: We think that the 100*l.*, advanced by the defendant to the plaintiff for a particular purpose, and laid out accordingly by him, cannot be set off as money received by him to the defendant's use.

Rule refused.

(a) April 20th. Before Lord Denman, C. J., Patteson, Williams, and Wightman, Js

**\*689] \*HANNAH FOSTER against The Governor and Company of the Bank of ENGLAND. *Friday, April 17th.***

Plaintiff having been a holder of 3½ per cent. stock, brought an action against the Bank of England for refusing to pay the dividends. The defendants pleaded, denying that plaintiff was proprietor of the stock in manner and form, &c.: and their defence in fact was that, before the dividends became due, the stock had been transferred out of plaintiff's name. Issue being joined, and notice of trial given,

The court, on motion, made an order that the plaintiff should be at liberty to inspect that particular entry, in the transfer book at the bank, which related to the transfer of the stock in question; but not any other part of the bank books.

A party having executed a transfer of stock in the form prescribed by stat. 11 G. 4 & 1 W. 4, c. 13, s. 13, cannot, in an action against the bank, dispute the title of the transferee, on the ground that he has not subscribed an acceptance of the transfer as directed by that clause.

**CASE.** The declaration (a) stated that plaintiff, before and at the time of the committing, &c., was the proprietor of and lawfully entitled to a certain interest or share in the capital or joint-stock of certain funds or public securities of Great Britain, called the New 3l. 10s. per centum annuities, originally created by an act made, &c. (11 G. 4, & 1 W. 4, c. 13,) and transferable at the said Bank of England, together with the proportional annuity attending the same, that is to say the dividends on the said stock payable half yearly, to wit, on the 5th January and 5th July, at the said Bank of England, according to the tenor and effect of the said act; to wit, an interest or share in the said stock to the amount of 375l. stock; which said stock, before and at the time of the committing, &c., was in the care of defendants, and standing in the public books of defendants in the name of plaintiff, for the purpose, amongst other things, of paying to plaintiff, or to such person or persons as she should legally appoint for that purpose, all the dividends, interest and produce thereof  
**\*690]** which might and \*should accrue due for and in respect of the said stock whilst the same should not be transferred to any person or persons in the said books with the order and authority of plaintiff. That, before and at the time of the committing, &c., plaintiff was entitled to the said stock and to the said dividends, interest and produce thereof as aforesaid, and the same had not been nor was, at the time of the committing, &c., nor are the said stock, &c., or any or either of them or any part thereof, now transferred in the said books to any person or persons with the order or authority of plaintiff. And that, before and at the time of the committing, &c., and whilst plaintiff was the proprietor of and so lawfully entitled to the said interest or share in the said stock, &c., as aforesaid, and before any transfer of the same by plaintiff for the payment of the said annuities and dividends, &c., thereof so due to plaintiff, a sufficient sum of money necessary in that behalf, to wit, 20,000,000l., had been and was, by order of the commissioners of her majesty's Treasury of the

(a) As to an amendment of this declaration in a former term by plaintiff, (a pauper,) see *Foster v. Bank of England*, 6 Q. B. 878.

United Kingdom, &c., or by other competent authority in that behalf, issued and paid to defendants(a) by way of imprest and upon account of and for the payment of the said annuities, which said sum so issued and paid to defendants as aforesaid, amounting, &c., defendants then had in their hands, the same then being applicable and legally and of right payable to (amongst others) the plaintiff to the amount of the said annuities: and thereupon it became and was the duty of defendants to pay to plaintiff, or to such person or persons as she should legally appoint for that purpose, on request, all the dividends, interest and produce \*which [ \*691 should and would accrue due for and in respect of the said stock of plaintiff whilst the same was not transferred in the said books of defendants to any person or persons with the order or authority of the plaintiff. That, whilst she was so possessed of the said stock as aforesaid, and entitled to the said dividends as aforesaid, and whilst defendants so had in their hands a sufficient sum of money applicable to the payment of the said dividends upon the said stock as aforesaid, and before the commencement of this suit, to wit, on, &c., a certain sum of money, to wit, 15*l.* 15*s.* 0*d.*, as and for the interest and dividends of divers, to wit, seven, half-yearly dividends due and of right payable as aforesaid to plaintiff upon and in respect of her said stock, became and was payable by defendants to plaintiff, and was then due to plaintiff; and thereupon, afterwards, and whilst the said dividends were and remained still due and unpaid, and whilst plaintiff was so possessed of the said stock as aforesaid, and whilst defendants so had the money aforesaid in their hands, applicable, &c., as aforesaid, to wit, on, &c., the same being a usual and proper day for that purpose, the plaintiff then attended at the Bank of England, and then requested defendants to pay her the last-mentioned dividends. Yet defendants did not nor would when so requested, or at any other time before or since, pay to plaintiff the said dividends or any part thereof, but then wholly neglected and refused so to do, contrary to their said duty and the said acts of parliament in such case, &c. To plaintiff's damage of, &c.

Pleas: 1. Not Guilty. 2. That plaintiff was not the proprietor of or entitled to the said share or interest in the capital or joint stock in the declaration \*mentioned together with the said proportional annuity [ \*692 attending the same or any part thereof, nor was such stock or any part thereof standing in the public books of the defendants in the name of plaintiff, in manner and form, &c. Conclusion to the country. 3. That no sum of money had been or was issued or paid to defendants upon account of or for the payment of the said annuities, and the said dividends, &c. thereon alleged to have accrued due to the plaintiff, or any part thereof, nor had defendants in their hands such sum of money as in the declaration mentioned in that behalf, or any part thereof, applicable or payable to (amongst others) the plaintiff to the amount of the said annui

(a) See as to this averment, *The Bank of England v. Davis*, 5 B. & C. 185.

ties or any part thereof, in manner and form, &c. Conclusion to the country. 4. That no sum of money as or for interest or dividends became or was payable by defendants to plaintiff, or was due to plaintiff upon and in respect of the said stock in the said declaration mentioned, in manner and form, &c. Conclusion to the country.

Issue having been joined on each plea, and notice of trial given,

*Pearson*, in Michaelmas term, 1845, moved for a rule to show cause “ why the plaintiff should not be at liberty to inspect all the entries or memoranda contained in the dividend and transfer books of the New 3½ per cent. annuities, mentioned in the declaration in this cause, and also the entries or memoranda in all other books of a public nature in the possession of the defendants, which in any way relate to, or contain entries of or respecting the dividends or transfer of the said stock or any part thereof, from the 1st January, 1838, to the commencement of this  
\*693] suit, so far as such entries or memoranda,\* or any of them, relate to or refer to any stock, dividends or annuities in which the plaintiff or her late husband, Samuel Foster, deceased, was, during that time, or now is, or claims to have been, interested in such stock ; and why the plaintiff should not be at liberty to take copies of all or any such entries ; and why all or any such copies, verified on oath, should not be given in evidence at the trial of this cause.”

The motion was grounded chiefly on an affidavit of Hannah Foster, the plaintiff, who stated : That, by transfers made to her, and after certain transfers made by her, (as the affidavit more particularly specified,) there was, on the last day of October, 1838, standing in her name in the Bank books, a total sum of 373*l.* 19*s.* 4*d.* New 3½ per cent. annuities ; that she had received at the bank the dividends on that sum, due in January 1839, July 1839, and January 1840, respectively ; “ and that she did, on each of those occasions when she so received such dividends, sign, by her mark, a receipt for such dividends in the books of the said defendants, which books, if produced or an inspection and copies allowed to deponent or her attorney, would, as deponent verily believes, fully establish the said several facts by the entries remaining in such books.” That, in July, 1840, a clerk in the bank, with whom she was acquainted, offered to procure and bring to her her dividend for that half year ; which he did. That, in January or February, 1841, she applied at the bank for the dividend due in January, 1841, but was informed that her stock had been transferred from her name in the bank books ; and payment of the dividend to her was refused. The deponent then stated reasons for suspecting fraud on the part of the before-mentioned clerk, who, as she was  
\*694] \*informed and believed, had absconded ; and she deposed that she had never herself sold or transferred, or been paid off, the said 373*l.* 19*s.* 4*d.* stock, or any part thereof, or been privy to the sale, transfer, &c., or authorized any person to sell, transfer, &c., and had never to her knowledge and belief been present when any transfer



of the said stock or any part thereof was made or accepted, and had never connived at any one's making, or writing her name to, any such transfer; nor had she ever received, or authorized any one to receive for her, less than the full dividend upon the said last-mentioned stock; and that, if the same had been sold out or transferred from her name in the bank books, or otherwise, such transfer must have been effected by forgery, felonious personation, or some other felonious act, unknown to her. That, although deponent had a just claim to the dividends, and was reduced to poverty by their being withheld, and the above facts had been communicated to the defendants, and she had offered them every information in her power respecting the said stock, and the supposed illegal transfer, yet they had thrown every possible impediment in the way of her action: that frequent applications had been made by deponent and her professional advisers to inspect the said books of defendants, and uniformly refused; and "that she verily believes that the entries still remaining in the ledger transfer books or other public books of the defendants would, if produced, fully substantiate all and every the above allegations, so far as the same can be substantiated by such books." And that she has no copy of any of such entries, and is advised and believes that she cannot safely proceed to trial without an inspection, and power of taking copies, of all such entries \*in the said books as relate to her said stock, and the subject of the present application. It appeared also, by the plaintiff's affidavit, and that of her attorney, that she possessed the stock receipts which had been delivered to her at the bank, when the several amounts of stock making up the 373*l.* 19*s.* 4*d.* were transferred to her, except one such receipt, which she believed to have been taken away by the above-mentioned clerk, then in the defendants' service. [\*695]

The plaintiff's attorney further stated, on information and belief, "that the said defendants allege that the said Hannah Foster hath sold or transferred the said mentioned stock or some part thereof to some person or persons whose name appears, together with that of the alleged signature of the plaintiff and the date of such alleged sale or transfer of the said stock, in the books of the said defendants, and that the same will so appear upon an inspection of the said books." And "that the said defendants refuse to allow the said several entries relating to the said stock and of the alleged transfer thereof by the said Hannah Foster to be inspected by the said plaintiff or some other competent person acting on her behalf, and to allow copies of all and every or any of such entries to be made or taken," &c. And that, to the best of deponent's judgment, &c., the plaintiff cannot safely proceed to trial without inspection of the said alleged transfer, if any, and ascertaining to whom the same was made, and the date and names of the witnesses, and inspection also "of the several entries of the said stock heretofore standing in the name of the said Hannah Foster or otherwise," and copies, &c. A rule nisi was granted.

\*696] In opposition to the rule, a clerk of Messrs. Freshfield, \*the bank solicitors, made affidavit: "That he hath been informed and believes that the title of the proprietors of any part of the several stocks transferable at the Bank of England, constituting the national debt of Great Britain, is evidenced and contained in certain inscriptions and entries in the ledgers kept at the bank for that purpose, and in which ledgers are contained the several accounts of all the respective proprietors of the said stock. And" "that stock is transferred from the accounts of proprietors by means of instruments of transfer executed by the respective proprietors or their attorneys duly authorized, which transfers are also entered in books kept at the bank for that purpose. And this deponent further saith that the instrument of transfer by the proprietor of stock is the evidence in the possession of the bank against any demand made by a proprietor of stock to the amount of the same stock after the same has been transferred. And" "that he verily believes the object of the plaintiff in the application to the court to inspect the transfers of stock made from her name is to elicit and prejudice the defence of the bank in this action, and that the same, if granted, will in no way aid the case of the plaintiff." The affidavits in opposition likewise set forth a correspondence between the plaintiff's solicitor and Messrs. Freshfield, in which the latter declined to give an inspection of the transfer books, but offered to admit the stock receipts, or to admit that plaintiff was, on or before 22d January, 1839, entitled to 373*l.* 19*s.* 4*d.* New 3*l.* 10*s.* per cent. annuities standing in her name in the bank books: and they ultimately wrote as follows: "We have always been ready to give the plaintiff the

\*697] means of proving her case, and, if necessary, to allow \*her to inspect and take a copy of her account of stock in the ledger of the bank: but the instruments of transfer from her account form no part of her title nor of her case; and, as they constitute the defence of the bank, we cannot consent to give copies of them." There was also an affidavit denying the alleged impediments to the plaintiff's action, and explaining the conduct of the bank officers.

In the same term,(a)

Sir *F. Kelly*, Solicitor-General, and Sir *J. Bayley*, showed cause. The defendants contest only the inspection of the transfer books. The bank, in its dealing with the public funds, performs only the office of a private banker, though regulated, from time to time, in the discharge of it, by acts of parliament. Stat. 20 G. 3, c. 16, "for raising a certain sum of money," (12,000,000*l.*,) "by way of annuities," &c., enacts (sect. 12,) "That in the office of the Accountant General of the Governor and Company of the Bank of England for the time being, a book or books shall be provided and kept, in which the names of the contributors shall be fairly entered; which book or books the said respective contributors, their respective executors, administrators, successors, and assigns, shall and

(a) November 25th. Before Lord Denman, C. J., Williams, Coleridge, and Wightman, Ja.

may, from time to time, and at all seasonable times, resort to and inspect without any fee or charge.”(a) But there is \*no such provision [698] as to transfer books, and *expressio unius est exclusio alterius*. A party transferring his stock is debited in the stockholders’ book with the amount transferred; and his account is closed. He has no interest in the transfer book. The instrument of transfer, and the power under which the stock is transferred, are the evidences of the bank, and their protection if a question arises on the regularity of the transaction. They, and the transferee, are the only persons whom the documents of transfer concern. To allow inspection of them by others would afford facility to frauds, which are often attempted. The parties holding such documents keep them as trustees for those actually interested. No instance can be shown, at least in modern times, where an inspection has been granted under circumstances like these. The plaintiff’s *prima facie* case is merely that she was a stockholder: the defendants are ready to admit that she was so down to the time when they allege a transfer to have taken place; or to allow an inspection of the stockholders’ book. The transfer is the case of the defendants; and they cannot be compelled to allow an adverse party to look into it: *May v. Gwynne*, 4 B. & Ald. 301; *Rex v. The Justices of Buckingham*, 8 B. & C. 375.

\**Pearson*, *contra*. The various documents of which the courts [699] will give a compulsory inspection are enumerated in note (1), by the editor of *Strange*, to *Rex v. The Hostmen in Newcastle upon Tyne*, 2 Stra. 1223, 3d ed., by Nolan. In the second class are mentioned “entries in the custom-house books, of the India Company and Bank stock, and transfer books.” In *Geery v. Hopkins*, 2 Ld. Ray. 851; S. C. 7 Mod. 129, the court granted a rule to inspect the East India Company’s book of transfer of stocks. Holt, C. J., said there: “If the bank deal in transfer of their stock, and that cannot be done by any other means than by entry made in their books, it is very reasonable that they should be produced for the benefit of the party, as well as corporation books, &c.” And (according to the report in 7 Mod.) the court said: “There is great reason for it, for they are books of a public company, and kept for public transactions, in which the public are concerned; and the books are the title of the buyers of stocks, by act of parliament.” That was an action between two holders of the company’s stock. In *Crew v. Saunders*, 2 Stra. 1005, a rule to inspect the post-office books was refused, but with-

(a) Sect. 15 enacts: “That as soon as any contributors, their executors,” &c., “shall have completed their payments of the whole sum payable by them respectively towards the said sum of twelve millions, the principal sum or sums, so by them subscribed and paid respectively, shall forthwith be, in the books of the Bank of England, placed to the credit of such respective contributors, their executors,” &c., “completing such payments respectively; and the persons to whose credit such principal sums shall be so placed, their respective executors,” &c., “shall and may have power to assign and transfer the same, or any part, share, or proportion thereof, to any other person or persons, body or bodies politic or corporate whatsoever, in the books of the Bank of England:” such sums to carry an annuity after the rate of 4l. per cent., and to be deemed stock transferable according to the meaning of this act, until redemption.

out denying the right to demand inspection of the bank books. The legitimacy of such demand, where the books are of a public nature and concern the rights of many, appears also from *Warriner v. Giles*, 2 Stra. 954; *Rex v. Tower*, 4 M. & S. 162; and *Rex v. The Bishop of Ely*, 8 B. & C. 112. The object of this motion is to obtain examined copies of the books, which copies are the legitimate evidence of their contents: *Breton* \*700] *v. Cope*, 1 Peake, N. P. C. 30; the courts allowing \*such proof on account of the inconvenience which would attend removing the books themselves: *Marsh v. Collnett*, 2 Esp. N. P. C. 665; *Mortimer v. M. Callan*, 6 M. & W. 58, 67. Stat. 20 G. 3, c. 16, s. 12, does not mention transfer books; but stat. 11 G. 4, & 1 W. 4, c. 13, "for transferring certain annuities of 4*l.* per centum per annum into annuities of 3*l.* 10*s.* or 5*l.* per centum per annum," enacts (sect. 13) that the annuities created by that act shall be each taken to be one capital or joint stock respectively; "that such capital or joint stock, or any share or interest therein, and the proportional annuity attending the same respectively, shall be assignable and transferable as this act directs, and not otherwise; and that there shall constantly be kept in the office of the Accountant General for the time being of the banks of England and Ireland respectively a book or books wherein all assignments or transfers of such capital or joint stock, or any part thereof, and the proportional annuity attending the same, at the rates aforesaid, shall be respectively entered and registered; which entries shall be conceived in proper words for that purpose, and shall be signed by the parties making such assignments or transfers, or, if any such party or parties be absent, by his, her, or their attorney or attorneys thereunto lawfully authorized by writing under his, her, or their hands and seals, to be attested by two or more credible witnesses, and that any person or persons to whom such transfer or transfers shall be made shall respectively underwrite his, her, or their acceptance thereof; and that no other method of assigning or transferring any such stock, and the annuities attending the same, or any part thereof, \*701] "or any interest therein, shall be good and available in law." Books which are the subject of these regulations cannot be placed on the footing of a private banker's account. In *Sloman v. Bank of England*, 14 Sim. 475, 486, SHADWELL, V. C., said, referring to stat. 11 G. 4, & 1 W. 4, c. 13: "The 10th section of the act provides that books shall be kept, by the bank, in which the names of the proprietors of the new stock shall appear. Then the 13th section, as I understand it, has made it the duty of the governor and company of the Bank of England to keep an account, in books to be provided for that purpose, which shall show every transfer and assignment which is made by parties appearing to be interested in the stock in question. They are made, if I may use the expression, the parliamentary bookkeepers of this fund; and it is a duty which they owe to all the persons who may be interested in the fund, so to keep the account as that it may distinctly appear, at all times, what

transfers and assignments have been made. And my opinion is, that if, at any time, there had been stock standing in the name of A., and, afterwards, that stock did not appear (no matter from what cause) to be standing in his name, A. would, *prima facie*, have a right to say: ‘Let the account stand as it did on a given day.’ If it can be shown that A. himself has transferred the stock, that is an answer; but the bank account ought to be kept with regard to every individual who ever appeared as a stock proprietor, in such a manner as to show what the account really is.” The cases referred to on the other side, in which parties have been exempted from furnishing evidence against \*themselves, are inap- [\*702 plicable, because the documents there were not held under any trust for the parties applying. Where that is the case, inspection will be granted, as in *Moody v. Thurston*, 1 Stra. 304, where “access was granted to the books of the commissioners for stating and determining the debts of the army, at the prayer of the defendant, being an officer’s widow.” If the stockholders’ books may be inspected, which is not denied, the transfer books, which are their sequel, ought not to be withheld. The whole account should be shown. [Lord DENMAN, C. J. If any thing has been conceded on the part of the defendants, the rule must be absolute to that extent; as to the rest, the question is very important, and we will consider of it.] *Cur. adv. vult.*

Lord DENMAN, C. J., in last Hilary vacation, (February 14th,) said: We think the plaintiff in this case should have an opportunity of seeing the book which contains the supposed transfer.

Ordered: “That the plaintiff be at liberty to inspect that particular entry in the transfer book which transferred the stock, mentioned in the declaration in this cause, from the plaintiff. And that the residue of the said rule be discharged.”

On the trial of the cause, before Lord DENMAN, C. J., at the London sittings after Hilary term, 1846, the defendants gave evidence of an entry in the transfer book for 1839. The material part was as follows.

“J. FERGUSON, S. Entered by R. BOGUEY, Jr. }  
 “Witness to the identity of Hannah Foster, W. OXLEY.” }

\*“I, Hannah Foster, of Ann Street, Cannon Street Road, St. George’s in the East, widow, this twenty-third day of January, [\*703 A. D. one thousand eight hundred and thirty nine, do assign and transfer three hundred and seventy-three pounds nineteen shillings and four pence, all my interest or share in the capital or joint stock of the New Three pounds and ten shillings per cent. annuities created by an act of parliament of the 11th year of the reign of his majesty King George IV., entitled,” &c., (title of stat. 11 G. 4, & 1 W. 4, c. 13,) “transferable at the Bank of England, unto David McNeil of the Stock Exchange, gent., his executors, administrators or assigns. Witness my hand: her

Witness. G. RIPPON.

J. R. DURRANT.

HANNAH + FOSTER.

mark.

"I do freely and voluntarily accept the above interest or share transferred to me.

Witness."

It was objected, on behalf of the plaintiff, that the transfer was invalid, because the acceptance was not signed by the transferee. The Lord Chief Justice reserved leave to move, if necessary, that a verdict should be entered for the plaintiff; and the jury found a verdict for the defendants.

*Shee*, Serjt., now moved according to the leave reserved. Stat. 11 G. 4, & 1 W. 4, c. 13, s. 13, (antè, p. 700,) expressly requires that the transferee shall "underwrite his" "acceptance." Stat. 33 G. 3, c. 28, creating a three per cent. stock, has a provision to the same effect, (sect. 14,) almost in the same words. [PATTESON, J. By the present act the \*704] transferror is enabled to act by \*attorney; but no such provision is made for the transferee. If the clause is to be construed literally, a foreigner taking a transfer must come to this country to accept it.] That certainly seems to follow. [PATTESON, J. It never is done. And it cannot lie in the mouth of the transferror to say, "you have not accepted the stock, and therefore I am still the holder." What would be the use of requiring it, when the transferror has got his money?] The introduction of a power to act by attorney in one case proves that the omission of it in the other was intentional. It is true that in *Rex v. Gade*, 2 Leach, C. C. 732, the prisoner was held to have been rightly convicted of forging a transfer under stat. 33 G. 3, c. 30, s. 2, though the supposed transferror had never accepted a transfer to himself; but there the offence, as proved, was a complete forgery, even assuming that the person named as transferror had not really possessed any stock. In *Davis v. The Bank of England*, 2 Bing. 393, 403, the statutory words requiring an acceptance by the transferee are pointed out by the Court of Common Pleas as material, and as being common to many, if not all, the loan acts: and it is said that "the assignment by the stockholder, and the acceptance by the assignees, complete the transfer." In *Coles v. The Bank of England*, 10 A. & E. 437, this court assumed that, by the statutes, a transfer ought to be underwritten by both parties, although, in that case, the party whose stock had been disposed of had, by her conduct, virtually recognised the transfer, and therefore her representatives could not dispute it. Here no such ratification is shown.

\*705] \*Lord DENMAN, C. J. It appears to me that this transfer was valid. It is impossible to think that the legislature intended all parties to lose the benefit of a transaction of this kind if there was not an acceptance formally underwritten, which death or many other events of probable occurrence might render impossible. The clause, 11 G. 4, & 1 W. 4, c. 13, s. 13, is certainly so worded as to make it appear that the intention was such; but the words themselves, if narrowly examined, do not support that conclusion. It is said that the "assignment or transfers" "shall be signed by the parties making such assignments or transfers,"



and that "any person or persons to whom such transfer or transfers shall be made shall respectively underwrite his, her, or their acceptance thereof;" and it is then enacted "that no other method of assigning or transferring any such stock" "shall be good and available in law." But these latter words are not applied to the acceptance; and it therefore appears that their effect is, really, confined to the act of transferring, and that the words requiring the acceptance to be underwritten are merely directory. *Rex v. Gade*, 2 Leach, C. C. 732, is in favour of this construction; for there the transfer to Harrison (whose name was forged on the subsequent fictitious transfer) did not purport to be accepted, yet it was held that the stock had legally vested in him. The practice notoriously agrees with the view we take; and we ought not to raise any doubts as to the effect of the statute.

PATTESON, J. The question here is not as to the transferee's title, but as to the right remaining in the transferror. I cannot think it essential to his parting with the stock that the other party, wherever residing, even if as far off as Russia, should sign an acceptance. There is [\*706 no enactment making this essential to the validity of the acceptance, though there is such a clause as to the transfer. I think the direction as to acceptance can have reference only to the rights of the transferee against the bank. Every thing has been done here which is requisite to the transfer; and I cannot think that a transferror, having done all that is necessary for this purpose on his part, can pocket the price of the stock and still say that he is the holder.

WILLIAMS, J. I am of the same opinion; and I think no doubt can arise except by confounding the parties to the transaction. Whatever may be the rights of the transferee before acceptance, the transferror cannot, after going through all the requisites of a transfer, assert that he is still the stockholder.

WIGHTMAN, J. It may be that the transaction is not complete, as between the transferee and the bank, till acceptance: but as against the transferror it clearly is so when the forms of a transfer have been gone through on his part. Rule refused.

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**\*TENNANT against CRANSTON. Friday, April 17th. [\*707**

The penalty imposed by stat. 17 G. 2, c. 3, s. 3, upon an overseer not giving a copy of a poor-rate on demand is claimable in the case of a poor-rate made under the regulations of stat. 6 & 7 W. 4, c. 96, (the Parochial Assessment Act,) the latter statute not repealing the former.

DEBT for 20*l.*, demandable by plaintiff (an inhabitant of the township of Kirby Lonsdale in Westmoreland, and the party aggrieved) of defendant, one of the overseers of the township, for not giving plaintiff within a reasonable time after demand, (alleged to have been made by plaintiff of

defendant at a reasonable time and place in that behalf,) a copy of a poor-rate made in October, 1845; plaintiff having offered to pay 6d. for every twenty-four names, according to the form of the statute, &c. (17 G. 2, c. 3.)

Plea: Nil debet.(a) Issue thereon.

On the trial, before PATTESON, J., at the last Westmoreland assizes, a verdict was found for the plaintiff for 20l., leave being reserved to move for a nonsuit on the point after mentioned.

Greig now moved that a nonsuit might be entered accordingly, or judgment arrested.(b) The penalty is given by stat. 17 G. 2, c. 3, s. 3. When that statute passed, poor-rates were made under the regulations of stat. 43 Eliz. c. 2, s. 1. The question is, whether the penalty is applicable to a rate made under the regulations of the Parochial Assessment Act, 6 & 7 W. 4, c. 96. This last prescribes a new form of rate; ss. 1, 2. By s. 2, \*and the schedule to the act, there must be  
\*708] ten columns in the rate:(c) under stat. 43 Eliz. c. 2, s. 1, there were commonly four only, headed, respectively, "Names of occupiers," "Description of the premises," "Annual value," "Sums assessed, in the pound." The duty of the overseers has increased much: and it appears to have been the intention of the legislature to substitute new regulations for the provisions of stat. 17 G. 2, c. 3, ss. 2, 3. A very much enlarged form of rate is required; and sect. 5 of stat. 6 & 7 W. 4, c. 96, enables parties rated to take copies or extracts gratis, and imposes a penalty of 5l., to be recovered in a summary way before a Justice of the Peace, for the refusal to permit such copies or extracts to be taken; whereas under stat. 17 G. 2, c. 3, s. 3, the penalty is recoverable by action. In *Rez v. The Justices of Devon*, 1 B. & Ald. 588, it was held that stat. 37 G. 3, c. 143, s. 1, giving justices at petty sessions within their divisions authority to appoint examiners of weights and balances, was inapplicable to divisions created since the statute. It is true that the words of the later statute, in the present case, are affirmative only. But "every affirmative statute is a repeal, by implication, of a precedent affirmative statute, so far as it is contrary thereto: for *leges posteriores priores contrarias abrogant*:" 7 Bac. Abr. 442, *Statute* (D), 7th ed. On this principle it was held, in  
\*709] *Regina v. St. Edmunds*, \**Salisbury*, 2 Q. B. 72, and *Regina v. The Justices of Suffolk*, 2 Q. B. 85, that stat. 5 & 6 W. 4, c. 76, s. 105, virtually repealed stat. 8 & 9 W. 3, c. 30, so far as regarded the jurisdiction of justices over appeals in boroughs having a grant of quarter sessions.

*Cur. adv. vult.*

(a) See *Earl Spencer v. Swanell*, 3 M. & W. 154.

(b) Before Lord Denman, C. J., Patteson, Williams, and Wightman, Js.

(c) He stated that the rate actually made in this case had sixteen columns; six columns in addition to those in the schedule, being inserted, under the order of the Poor Law Commissioners, 23d April, 1842, (see Archb. Poor Law, 171, 4th ed.) headed, respectively, "No. of votes," (after "Name of occupier,") "No. of votes," (after "Name of owner,") \*Total amoun. to be collected," "Amount actually collected," "Present arrears," "Amount not recoverable or legally excused."

Lord DENMAN, C. J., in this term, (April 25th,) delivered the judgment of the court.

The court, upon consideration, is of opinion that the Parochial Assessment Act, 6 & 7 W. 4, c. 96, has not the effect of repealing stat 17 G. 2, c. 3, ss. 2, 3. The rule, therefore, must be refused.

Rule refused.

**JOSEPH ELLIS against ALFRED ABRAHAM. *Saturday, April 18th.***

In an action for malicious prosecution for perjury, where the indictment contains two assignments of perjury, if the plaintiff, at the trial of the action, confine his case to one of the assignments, the defendant is not entitled to prove that there was reasonable and probable cause for the charge contained in the other assignment.

**CASE, for a malicious prosecution for perjury.**

The declaration charged that defendant, contriving, &c., heretofore, to wit, on, &c., at the General, &c., (Central Court,) before, &c., and others their fellows, justices, &c., falsely and maliciously, and, without any reasonable or probable cause, indicted and caused to be indicted the plaintiff: For that he, on the trial of a certain issue in an action upon promises, wherein Lyon Samuel was plaintiff and the now defendant was defendant, before Thomas Lord DENMAN, Lord \*Chief Justice, &c., having been duly sworn, &c., before the said T. Lord D. and the said [\*710 T. Lord D. having sufficient, &c. to administer the said oath, "and it being, upon the trial of the said issue, material to ascertain whether the said Lyon Samuel had sold and delivered unto the now defendant a certain parcel of turquois stones, and whether the said Lyon Samuel had bargained and sold unto the now defendant a certain other parcel of turquois stones, and whether the now defendant went to the shop of the said Lyon Samuel on 4th May, A. D. 1843, and purchased of L. S., in his said shop, a certain parcel containing divers, to wit, 50,200 turquois stones, and whether the now plaintiff then and there counted out the said 50,200 turquois stones, and whether the now defendant then and there took the said stones away with him from the shop of the said L. S., or whether the now plaintiff took them to the house of the now defendant, and whether the now plaintiff left at the house of the now defendant a bill of parcels of the said turquois stones, and whether the now defendant on 31st July, in the year last aforesaid, bought of the said L. S., at the shop of the said L. S., a certain other parcel, containing (to wit) 20,150 turquois stones, and whether the now defendant sealed the last-mentioned parcel of stones in the shop of the said L. S., and in the presence of the now plaintiff," "did falsely, corruptly, knowingly, wilfully and maliciously depose and swear, amongst other things, to the substance and effect following, viz.: That, on the 4th day of May, A. D. 1843, the now defendant came to the said Lyon Samuel's house, and purchased 50,200

turquoise stones at 10s. 6d. per thousand, and that the now plaintiff  
 \*711] counted them out, and that he was not \*certain whether the now  
 defendant took them away, or whether he the now plaintiff took  
 them to the now defendant's house; that he the now plaintiff left a bill  
 of parcels at the said house; and that, on the 31st July, A. D. 1843, the  
 now defendant bought the second lot (meaning the said parcel of tur-  
 quois stones secondly above mentioned) at the said Lyon Samuel's shop;  
 and that, after the now defendant bought them, they were sealed by him  
 in the presence of the now plaintiff at the shop of the said L. S.:  
 Whereas, in truth and fact, the now defendant did not, on the 4th day  
 of May, A. D. 1843, go to the house of the said L. S. and purchase of  
 him there 50,200, or any other number of turquoise stones, at 10s. 6d. per  
 thousand, or at any other price whatever; and the now plaintiff did not  
 count the said last-mentioned turquoise stones; and neither did the now  
 defendant take the said last-mentioned turquoise stones away, nor did the  
 now plaintiff take the same or any of them to the house of the now  
 defendant; and the now plaintiff did not leave at the house of the now  
 defendant any bill of parcels of the said turquoise stones; and the now  
 defendant did not, on the said 31st day of July, or at any other time, buy  
 at the shop of the said Lyon Samuel the said parcel of turquoise stones  
 secondly above mentioned; and the said parcel of turquoise stones  
 secondly above mentioned were not sealed by the now defendant in the  
 presence of the now plaintiff in the shop of the said L. S." That  
 defendant afterwards, to wit, on, &c., falsely and maliciously, and without  
 any reasonable or probable cause, forced and compelled plaintiff to find  
 \*712] bail, to wit, &c., to answer the said indictment, and to \*enter into  
 a recognisance, &c., before, &c., in the sum, &c., that plaintiff  
 should personally appear, &c., and there to plead, &c., and take his trial  
 on the said indictment, &c. Which said indictment our said lady the  
 queen, &c. (certiorari.) That defendant, afterwards, falsely and maliciously,  
 and without any reasonable or probable cause, prosecuted, and caused to  
 be prosecuted the indictment against plaintiff, until plaintiff afterwards,  
 to wit, at the sittings, &c., (27th November, in the same year, in London,)  
 before Thomas Lord DENMAN, &c., was, in due manner and by due  
 course of law, acquitted of the said premises in the said indictment  
 charged upon him, by a jury of the said city of London; and where-  
 upon, &c. (judgment thereon in Hilary term;) as by the record, &c. By  
 means of which said several premises plaintiff hath been and is greatly  
 injured, &c.

Plea, Not guilty. Issue thereon.

On the trial, before Lord DENMAN, C. J., at the London sittings after  
 last term, the counsel for the plaintiff confined his case to the assignment  
 of perjury respecting the transaction on 4th May, 1843. The defendant's  
 counsel insisted that the action was not maintainable if there was reason-  
 able and probable cause for the indictment, although one of the assign-

ments of perjury might be groundless; and he contended that he was entitled to produce evidence to show, that there was reasonable and probable cause for the assignment of perjury, respecting the transaction of 31st July, 1843: but the Lord Chief Justice refused to receive this evidence, and directed the jury to confine their attention to the evidence respecting 4th May, 1845. Verdict for plaintiff.

\**W. H. Watson* now moved (a) for a new trial, on the ground of misdirection, and the improper rejection of evidence. The action cannot be supported if there be reasonable and probable cause for any substantive charge in the indictment; for then the indictment is not preferred without reasonable and probable cause. This point was raised in *Delisser v. Towne*, 1 Q. B. 333; but the verdict in that case was afterwards entered by consent of counsel; and the argument as to this is not reported. (b) *Reed v. Taylor*, 4 Taunt. 616, (c) is certainly an authority against the defendant: but an opposite doctrine was laid down by Lord MANSFIELD, and Lord LOUGHBOROUGH, in *Johnstone v. Sutton*, 1 T. R. 510, 547. (d) Proof of the reasonableness of the indictment as to one assignment must, at any rate, be some evidence to negative malice. The pleader who draws the indictment may, on inaccurate instructions, add to a true assignment of perjury other assignments which turn out to be groundless: can such an addition entitle the party acquitted on these to maintain an action? If an indictment contained twenty counts, and the defendant were found guilty on nineteen, and acquitted on the twentieth, could he bring an action for malicious prosecution, and exclude all consideration of the verdict and judgment on the nineteen?

*Cur. adv. vult.*

Lord DENMAN, C. J., in this term, (April 25th,) delivered the judgment of the court.

This was an action for a malicious prosecution for \*perjury. The indictment for perjury contained two assignments of perjury. The plaintiff, as to one of these only, gave evidence to show that the charge was malicious, and without reasonable or probable cause, and left the case there; and the jury found a verdict for him. A new trial has been moved for, on the ground that the defendant was not permitted to show that there was reasonable and probable cause for the charge contained in the other assignment for perjury. The court, upon consideration, is of opinion that such evidence was not admissible: and the rule must be refused.

Rule refused.

(a) Before Lord Denman, C. J., Patteson, Williams and Wightman, Js.

(b) See 1 Q. B. 337, note (a).

(c) See 1 Q. B. 339, note (b)

(d) See *Sutton v. Johnstone*, 1 T. R. 493, 507, 508.

**DOE on the demises of ELIZABETH CROSS and Others against  
CROSS. *Friday, April 17th.***

P., being in India, in 1840, executed the following instrument, attested by two witnesses.

“Know all men,” &c., “that I make,” &c. E. my “lawful attorney, for me in my name and to my use to ask, demand,” &c., “or receive the possession of, or produce of, the rent of the freehold of,” &c. “And I do empower her, the said” E., “to hold and retain all proceeds of the said property for her own use, until I may return to England, and claim possession in person; or, in the event of my death, I do hereby, in my name, assign and deliver to the said” E. “the sole claim to the before-mentioned property, to be held by her during her life, and disposed of by her as she may deem proper at the time of her death: at the same time I wish it to be understood that I claim all right and title to the said property on my arrival in Great Britain, when the term of the said” E.’s “occupancy shall be considered at an end.” “In witness,” &c.

The instrument was acted on as a power of attorney by E. Afterwards P. died in India, without returning to Great Britain, and left E. surviving:

*Held*, that the instrument operated, on P.’s death, as a devise to E.

**EJECTMENT for messuages and lands in Oxfordshire.**

On the trial, before PLATT, B., at the last Oxfordshire assizes, it appeared that the title of the lessor of the plaintiff, on the first and third demises, depended upon the effect of the instrument hereafter set out.

\*715] Peter Cross, being tenant in fee-simple of the property, and “being at that time a soldier on service in the East Indies, executed the following paper, which was attested by two witnesses.

“Know all men by these presents, that I, No. 375, Peter Cross, private soldier,” &c., “at present serving at Deesa, in the East Indies, for divers considerations and good causes me hereunto moving, have made, ordained, appointed, and by these presents do make, ordain, constitute and appoint my mother, Elizabeth Cross, widow, of,” &c., “my true and lawful attorney, for me in my name, and to my use to ask, demand, recover or receive the possession of, or produce of, the rent of the freehold of a house and five acres of land, my property, in virtue of the next of kin of my father, deceased on the 31st day of August, 1836. And I do empower her, the said E. C., to hold and retain all proceeds of the said property for her own use until I may return to England, and claim possession in person; or, in the event of my death, I do hereby, in my name, assign and deliver to the said E. C., the sole claim to the before-mentioned property, to be held by her during her life, and disposed of by her as she may deem proper at the time of her death: at the same time I wish it to be understood, that I claim all right and title to the said property on my arrival in Great Britain, when the term of the said E. C.’s occupancy shall be considered at an end. In witness whereof, I do hereby set my hand, at,” &c. “4th September, 1840.”

Elizabeth Cross acted, upon this instrument, as the attorney of Peter Cross. He afterwards died in India, never having returned to Great Britain, and left Elizabeth Cross surviving him. The lessor of the plaintiff,

\*716] as to the first and third demises, made title under the above “instrument as a devise of the property to Elizabeth Cross. The



learned baron reserved leave to enter a nonsuit on this point: subject to which the plaintiff had a verdict on the first and third demises. On the other demises, a verdict was found for the defendant.

*Keating* now moved according to the leave reserved. No case can be shown in which an instrument, intended to take effect during the life of the party executing it, has been treated as a will. [Lord DENMAN, C. J. The part of this instrument which constitutes the will is not so intended. If I lease to a man for years, and grant him the land after my death, by one instrument, will not the latter part take effect as a will?] Not if the instrument be acted upon as a lease. [WIGHTMAN, J. May not I write a will on the same piece of paper with a lease?] Would a deed reserving a life-estate to the settlor, and creating an estate in remainder, operate as a will? It has been held that it may, where the deed has never been parted with or acted upon during the life of the party; *Attorney-General v. Jones*, 3 Price, 369:(a) but even that decision has been impugned; 1 Jarman on Wills, 17, (ch. 2.) Suppose the party had come to England, avoiding thereby the power, could it afterwards have operated as a will?

Lord DENMAN, C. J. I cannot see the least ground for doubt in this case. The party has power to dispose of the property; he executes the instrument as a will; and he does dispose. If a man, being in India, by a deed-poll gives something to his mother, and adds, "I \*also [\*717 devise and bequeath" so and so, why are we to say that is not a will? What principle of law is there to prevent it from being a will? We are called upon to create a new and arbitrary rule for the purpose of getting rid of a disposition of property made in the event of the death of the party disposing.

PATTESON, J. Mr. *Keating* relies upon the difficulty suggested as arising upon the provision which applies only to the event of the party not returning from India. That, however, is confined to the power of attorney, which is to operate immediately. The main object of the instrument is the will; which is to operate as such upon his death, whether the rest of the instrument continue in force for the mean time or not.

WILLIAMS, J. The power of attorney operates in one event only, and for a certain time. But it by no means follows that the instrument may not take effect as a will, in the event of the party's death.

WIGHTMAN, J. Mr. *Keating* appears to admit that this instrument would be a will if it contained only the disposing part. But it does not follow, from other provisions being inserted, that such part is not to operate.

Rule refused.

(a) See *Tompson v Browne*, 3 M. & K. 32, 35.

**\*718] \*ELIZA ANN EADES against BOOTH. Tuesday, April 21st.**

An infant was admitted to sue by her father and next friend, on a petition signed for her by the father, and on affidavit verifying the signature and stating that the infant was only twenty-one months old, and unable to write or make her mark.

*Spinckes* moved that the plaintiff, an infant, might be permitted to sue by her father and next friend. The application had been made to a judge at chambers on a petition of the infant, (addressed to the Lord Chief Justice,) stating that she had, as she was advised, a good cause of action against the defendant for injuries sustained by her by the defendant's horse and cart running against her through the negligence of defendant, &c., and that she had lately commenced an action against him in this court for the same injuries. The petition concluded as follows.

“But, in regard that the petitioner is an infant under the age of twenty-one years, to wit, of the age of twenty months, your petitioner, by her father, George Eades, humbly prays your lordship to permit her to prosecute the said action by the said George Eades, her father and next friend. And your petitioner will ever pray, &c.

“ELIZA ANN EADES.

“Signed by me for her, being her father and next friend,

“GEORGE EADES.”

Underneath was written a consent, subscribed by George Eades, that the plaintiff should prosecute by him.

The petition not being signed by the infant herself, the learned judge referred the case to the full court. Affidavit was made by a party who stated himself to be attorney for the plaintiff in this action, verifying the  
**\*719]** \*signatures of George Eades, and deposing further that Eliza Ann Eades was an infant of the age of twenty-one months, and unable to write or make her mark; that she had lost her right arm in consequence of the injuries for which this action was brought; “and that, for the above reasons, the said plaintiff is totally unable to sign the necessary petition for leave to sue the said defendant by her next friend.” The deponent added that, in his judgment and belief, the injuries were a good cause of action. On this statement,

*The Court* (a) granted the prayer of the petition.

(a) Lord Denman, C. J., Patteson, Williams, and Coleridge, Ja.

**The QUEEN against WILLIAM JONES. *Wednesday, April 22d.***

Stat. 6 & 7 Vict. c. 36, s. 1, exempts from parochial and other rates all land, houses, &c., "belonging to any society instituted for purposes of science, literature, or the fine arts exclusively, either as tenant or owner, and occupied by it for the transaction of its business," "provided that such society shall be supported wholly or in part by annual voluntary contributions, and shall not, and by its laws may not, make any dividend," &c., "in money unto or between any of its members."

*Held* that, to come within this exemption, a society must have an express law prohibiting any such dividend, &c.

*Seemle*, that a society, instituted for the diffusion of religious principles and sentiments, though by literary means, (such as the Religious Tract Society,) is not within the exemption.

On appeal by a rate-payer of the parish of St. Gregory by St. Paul in the city of London (*a*) against the certificate after mentioned, the sessions annulled the certificate and allowed the appeal, subject to the opinion of this court upon a special case, the material parts of which were as follows.

The certificate was granted by the barrister \*appointed to cer- [\*720  
tify rules of Friendly Societies, under the provisions of stat. 6 & 7  
Vict. c. 36, in favour of a society called the Religious Tract Society. The  
said certificate was granted by the barrister after the performance of all  
the formal preliminaries required by the act, and was regularly given by  
him on the proper copies of the laws, rules and regulations for the man-  
agement of such society, in the following terms. "I hereby certify that  
this society is entitled to the benefit of an act passed in the sixth and  
seventh years," &c., "entitled," &c. "John Tidd Pratt, the barrister  
at law appointed," &c. "18th October, 1843." One of such copies,  
when duly certified as aforesaid, was returned to the said society;  
another copy was retained by such barrister; and the other of such copies  
was transmitted by him to the clerk of the peace for the city of London,  
and was duly allowed and confirmed at the general quarter sessions for  
the said city, and filed by the said clerk of the peace. The respondent  
W. Jones was, at the time of granting the said certificate, and thence  
has been and still is, the superintendent and corresponding secretary of  
the said society.

Certain houses and premises in the said parish then belonged, and  
thence have belonged, and still belong, to the said society, and then were  
and thence have been and still are occupied exclusively for the transac-  
tion of its business, and for carrying into effect its purposes; and the said  
respondent claimed on the part of the said society to be exempted by vir-  
tue of the said recited act and the said certificate from a rate made on 4th  
January, 1844, for the relief of the poor of the said parish, and in which  
the appellant was and is duly rated.

The Religious Tract Society was instituted in 1799. It is conducted by

(*a*) The appellant, by his petition and appeal to the London quarter sessions, stated that he was assessed to a rate made for the relief of the poor of the above parish, on, &c.; that the Religious Tract Society were assessed to the same; and that they claimed exemption under the barrister's certificate.

\*721] a committee, annually chosen at its \*general meeting, and composed of an equal number of members of the Church of England and of Protestant dissenters. It publishes and circulates religious books and treatises in foreign countries as well as throughout the British dominions. Some of these books and treatises are exclusively and directly religious, and make known the great essential truths of religion as set forth in the doctrinal articles of the Church of England; and the remainder, comprising treatises on subjects of science, as light, heat, electricity, zoology, &c., are written so as to render scientific information subservient to the diffusion of religious principle and feeling. The following is a copy of the laws, rules and regulations of the society on which the certificate was granted.

“Religious Tract Society, Instituted 1799.” (Then follow the names of the treasurer, secretaries, &c.)

“Regulations of the Society:—1. That this society be denominated the Religious Tract Society, the object of which is the circulation of small religious books and treatises in foreign countries as well as throughout the British dominions. 2. That a donation of ten guineas constitute a member for life. 3. That every annual subscriber paying half a guinea a year or more be considered as a member. 4. That the subscriptions solicited be employed as a means of enabling the society to distribute and sell the tracts at a cheap rate. 5. That subscribers be allowed to purchase at reduced prices. 6. That a committee be annually appointed in London to conduct the business of the society, consisting of four ministers and eight laymen; and that three ministers and six laymen, who have most constantly attended, shall be eligible for re-election the ensuing year; and \*that the committee for the time being be appointed to fill up  
\*722] vacancies. 7. That a corresponding committee be appointed in different parts of the United Kingdom, with a view to promote the objects of the society by encouraging the distribution of religious tracts by individuals or by local societies formed for that purpose, and to obtain subscriptions or collections in aid of its funds. 8. That the treasurer, secretaries, and trustees, be considered as members of the committee. 9. That the committee be authorized to grant to clergymen or other ministers, who may make collections for the society, a return of tracts, if required, to the amount of one-half of such collections; and that, when their remittances at one or more periods shall amount to twenty guineas or upwards, the clergyman or minister be considered a member for life, and be presented with a set of the society's first series of tracts. 10. Empowering a committee to nominate honorary members from among persons in foreign parts. 11. That an annual meeting of the society be held in the month of May, when a treasurer, committee, and secretaries, shall be chosen. 12. That the tracts be paid for on delivery. The 43d, 44th, and 45th reports of the society, together with the address, catalogues, appendices, and documents annexed thereto respectively, and of which a list was given in the

table of contents prefixed to each of the said reports, were to be taken as part of this case and descriptive of the objects of the society; and might be referred to by either party on the argument.

The books and treatises so disseminated by this society consist partly of old works in which there is no copyright, and partly of works which have been written for the society, and the copyright of which \*be-  
 belongs to them; and among these works are translations from [\*723  
 foreign languages into English, and also original compositions in and translations from English into upwards of ninety languages and dialects of other countries in which they have been circulated. Of these books and treatises a very large number (the issue thereof by the said society having frequently amounted during the period of twelve months to not less than twenty millions) are annually published by the society, and circulated in Great Britain and foreign countries, partly gratuitously, and the remainder sold at fixed prices to any persons, whether members of the society or not, desirous of purchasing the same. The society is, and always has been, supported by voluntary contributions, aided by the proceeds, after paying all expenses, of such of the books and treatises as are sold; and the whole of its funds derived from both sources are, and always have been, applied to no other purpose or object than that of maintaining and extending the circulation of the society's books and treatises, with a view to the dissemination of religious opinions and sentiments consistent with those commonly termed evangelical, in manner aforesaid, except that assistance in money or papers is occasionally granted to societies established in foreign countries for promoting similar objects.

No dividend, gift, or bonus in money, is or ever has been made unto or between any of the members of or subscribers to the said society.

The appellant, notwithstanding, contended that, in the absence of any express regulation prohibiting such use of the society's funds or property, it was not within the protection of the statute. The respondent, on the  
 other hand, alleged that, although there was no such express [\*724  
 regulation, any such use of the society's funds or property would  
 be in direct contravention of the constitution and objects of the society, and was, therefore, impliedly prohibited; and consequently that no such dividend, gift, division, or bonus in money within the meaning of the act might by its laws be made.

The question for the court was, whether the Religious Tract Society was and is a society entitled to the certificate of exemption, against the barrister's decision in granting which the said appeal was made. If this court should answer this question in the affirmative, the order of sessions was to be quashed, and the certificate to stand confirmed; otherwise the order to stand confirmed.

*B. C. Robinson*, in support of the order of sessions.

First: Stat. 6 & 7 Vict. c. 36, s. 1, (a) provides that no person shall be

(a) The act is cited more at large in the next case, pp. 730, 731.

assessed to any county, parochial or other local rates or cesses in respect of any land, houses, &c., belonging to any society answering the description therein contained, “provided that such society shall be supported wholly or in part by annual voluntary contribution, and shall not, *and by its laws may not*, make any dividend, gift, division, or bonus in money unto or between any of its members.” This section appears to require, not only that in point of fact no such dividend, &c., be made, but that the laws of the society should expressly prohibit it. Even supposing, therefore, that in the case of *The Religious Tract Society* no pecuniary advantage whatever is derivable by its members, (which is scarcely the fact, \*725] inasmuch as, by rule 5, \*members are permitted to purchase the works published by the Society at reduced prices,) it would not be within this provision of the act, as none of the rules prohibit the deriving of such advantage, or render it impossible. Secondly: The exemption from rating is confined to “any society instituted for purposes of science, literature, or the fine arts exclusively.” This cannot be called a society instituted for either of these purposes “exclusively,” if at all. Science and the fine arts are of course out of the question; and, with respect to literature, the Society can only be said to be concerned with it as auxiliary to religious purposes. Its main object is the distribution of tracts of a purely religious character: and, although it does also distribute treatises of a scientific or popular character, these also are made subservient to the same general purposes described in the case as “the dissemination of religious opinions and sentiments consistent with those commonly termed evangelical.” Nor is the ordinary class of the Society’s publications of such a character as to answer the ordinary meaning of the word “literature.” (Several extracts from the tracts of the Society, made part of the case by the terms of it, were read by counsel in support of this argument.)

*Talfourd*, Serjt., contrà. First: The act undoubtedly requires that a society, to claim its exemption, not only shall not, but “by its laws may not,” make any distribution of profits. But it is not, therefore, necessary that this restriction should be nakedly stated in a negative form in its rules. It is quite sufficient that the laws of the society not only ratify no such distribution, but, by specifying the objects of the society in such a \*726] \*manner as to negative the supposition, virtually exclude it; and that is the case here.

Secondly: This is a society possessing the copyright of many literary works, and employing literary men, learned in various languages, for the production and distribution not only of religious tracts in the ordinary sense, but also of works of scientific and general instruction. To argue that, because there is an ulterior object, the dissemination of what is believed to be religious truth, therefore the purposes of the society are not purposes of literature, is to misconstrue the meaning with which those words are used in the act; and to explain “instituted for purposes of



science, literature," &c., as meaning, "having science, literature, &c., for its ultimate end or object." That would be an interpretation conveying no intelligible sense. Mere literature never can be an ultimate end or object. It is always a means used toward the attainment of an end. Whether that end be simply amusement, or the acquisition of knowledge on particular subjects, or of knowledge generally, still, in every case, literature is only employed as a necessary means for obtaining it. To say, therefore, that a society is instituted for purposes of literature must mean that its subject-matter, that about which it is conversant, is literature. Then, however, it is contended that these religious publications are not "literature" in its ordinary sense. But literature is a general word, applicable to many subjects. We constantly speak of the "religious literature" of the day. And it would be a very unnecessary limitation of the words of the statute, to contend that this or that class of literature was meant to be excluded, or this or that class alone in contemplation. On this view of the subject, "The \*Religious Tract Society" is instituted for literary purposes; instituted, no doubt, with the ulterior purpose of advancing religion, but by literary means. Its purposes are also, in this sense, "exclusively" literary; that is to say, it proposes to produce the end it contemplates by the diffusion of religious literature alone; not, as other religious societies may do, partly by other means, as by the employment of missionaries. This appears plainly from its rules, and the description given of it in the case. Nor is it conceivable that a society, concerned in what may truly be regarded as the highest branch of all literature, should not have been intended by the legislature to enjoy the exemption. [\*727]

Lord DENMAN, C. J. It appears to me that the first question is free from doubt. I cannot read the requisition of the statute otherwise than as importing that a society, to enjoy the privilege of the act, must adopt some express rule preventing the making of any dividend, gift, division, or bonus in money; and I do not think it enough that its laws should contain nothing to countenance such sharing of profits. This is sufficient for the decision of the present case. But, inasmuch as this difficulty may be removed at once by the adoption of an additional rule, it may be advisable, though not necessary, to remark how the other provisions of the act bear on this society. It has been argued, with great force and eloquence, that its purposes are literary in the true sense of the word. But it is, in ordinary language, a "religious" society; one for "religious" purposes; and, when we are pressed with the argument that it could not be intended to exclude such societies from the benefit of the act, I think it is still less credible that, if the legislature intended to include "religious" purposes, they would not have been specified, and at the head of the list. At least, I think the question so doubtful (without feeling myself called upon to give an express opinion) that I [\*728]

should hesitate to say that the word "religious" is included within the word "literary."

PATTESON, J. I am also of opinion that the first objection is fatal; the words of the act import that the society must have a prohibitory law. As to the other point, it is not necessary to decide it conclusively; but, as at present advised, I think this not a society within the meaning of the act. No doubt it has purposes of a far higher nature than those of literature; but "literary" I think they are not; still less "exclusively" literary. The real purpose is, the dissemination of religious principles and feeling.

WILLIAMS, J. As to the first point, I concur in the judgment of the court. As to the second, any opinion which I may give is extra-judicial only; but I cannot think this a society instituted exclusively for literary purposes. It may use literary means; but not for purposes ordinarily called literary.

WIGHTMAN, J. I likewise concur as to the first point. With respect to the other, I should feel myself under great difficulty if I were required to say that this is a society instituted exclusively for purposes of literature; but it is not necessary to give a decided opinion.

Order of sessions confirmed.(a)

(a) Reported by *H. Merivale, Esq.* See the next two cases.

\*729] \* [The two following cases, decided in Trinity term, 1846, and Hilary vacation, 1848, may conveniently be inserted here.]

The QUEEN against POCOCK. *Wednesday, June 3d, 1846.*

By the rules of a society, it was provided, That this institution should be designated The Institution for promoting education of the labouring and manufacturing classes of society of every religious persuasion; and, for the purpose of making manifest the extent of its objects, the title of the society should be the British and Foreign School Society; that a school should be maintained to educate children for the purpose of supporting and training up teachers; and it was stated that the grand object of the institution was to promote education in general. In the normal school for training teachers, lectures were to be given on specified branches of literature, science, and the fine arts; also lectures on the art of teaching, and Bible lessons. Instruction was also given in needlework. There were model schools, for boys and girls, "for the purpose of elucidating the art of teaching:" and it was stated that "the number of children in them is large, in order to afford a sufficient scope and opportunity for the pupil teachers to instruct and put in practice the science of teaching: the object of the institution being to train up teachers who may promote education according to the particular system of this institution, both in the United Kingdom and in the colonies."

*Held*, that the society was not "instituted for purposes of science, literature, or the fine arts exclusively," within the meaning of stat. 6 & 7 Vict. c. 36, s. 1; and, therefore, that the lands, &c., belonging to it were not exempted by that statute from rates.

The society obtained the barrister's certificate under the act, which was filed: after which an assessment of rates was made under a local act, (10 G. 4, c. cxxviii.): afterwards notice of the filing was given to the collector of rates, and to the trustees under that act; after which another assessment was made.

*Held*, that an appeal made within four calendar months next after the assessment last mentioned, though not within four calendar months next after the assessment first mentioned was in time, within stat. 6 & 7 Vict. c. 36, s. 6, as being made "within four calendar months next after the first assessment" "after such exemption shall have been claimed by such society."

On appeal, on behalf of Thomas Pocock, against the certificate of the barrister appointed to certify the rules of Friendly Societies, granted to the British and Foreign School Society, under stat. 6 & 7 Vict. c. 36, which certificate was dated 22d August, 1844, and was allowed and confirmed at the General Quarter Sessions for Surrey, holden by adjournment on 9th September, 1844, the sessions dismissed the appeal, subject to the opinion of this court on a case which was substantially as follows.

The appellant was a person assessed to a rate made \*on the 4th March, 1845, by the trustees of the South district of the parish of St. George the Martyr, in the borough of Southwark, under an act, &c., (10 G. 4, c. cxxviii., local and personal, public,) for watching, lighting, &c., the roads, streets, &c., leading from the Stones End, &c., within the parish of St. George the Martyr in Southwark in the county of Surrey [\*730]

By the 50th section of stat. 10 G. 4, c. cxxviii., it is enacted that all charitable institutions within the said district shall be rated.

By stat. 6 & 7 Vict. c. 36, ("an act to exempt from county, borough, parochial, and other local rates, lands and buildings occupied by scientific or literary societies,") it is enacted (a) that "no person or persons shall be assessed or rated, or liable to be assessed or rated, or liable to pay, to any county, borough, parochial, or other local rates or cesses, in respect of any land, houses, or buildings, or parts of houses or buildings, belonging to any society instituted *for purposes of science, literature, or the fine arts exclusively*, either as tenant or as owner, and occupied by it for the transaction of its business, and for carrying into effect its purposes, provided that such society shall be supported wholly or in part by annual voluntary contributions, and shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members, and provided also that such society shall obtain the certificate of the barrister at law" appointed to certify the rules of Friendly Societies in England as thereinafter mentioned.

\*By the same statute it is enacted (b) that three copies of the rules of such society shall be submitted to such barrister, and such barrister shall certify on each copy that the society applying is entitled to the benefit of this statute, or the grounds on which the certificate is withheld: and that one of such copies, when certified by such barrister, shall be returned to the society, another copy shall be retained by such barrister, and the other of such copies shall be transmitted by such barrister to the clerk of the peace for the borough or county where the land or buildings, in respect of which the exemption is claimed, shall be situated, and shall by him be laid before the recorder or justices for such borough or county at the general quarter sessions, or adjournment thereof, held next after the time when such copy shall have been so certified and transmitted to him; and the recorder or justices are required to allow and confirm the same; and such copy shall be filed by the clerk of the peace [\*731]

with the rolls of the sessions of the peace in his custody, without fee or reward.

By the same statute it is enacted (a) “that any person or persons assessed to any rate from which any society shall be exempted by this act may appeal from the decision of the said barrister” to the quarter sessions, “within four calendar months *next after the first assessment of such rate made after such certificate shall have been filed* as aforesaid, or within four calendar months *next after the first assessment of such rate made after such exemption shall have been claimed* by such society, such appellant first  
\*732] giving to the clerk or \*secretary of the society in question,” twenty-one days’ notice of appeal in writing, with a statement in writing of the grounds thereof.

The British and Foreign School Society, in August, 1844, caused three copies of all the laws, rules and regulations for the management thereof (duly signed and countersigned) to be submitted to the barrister appointed as above, for the purpose of ascertaining whether such society was entitled to the benefit of the last-mentioned act: and such barrister, on the 22d day of the same August, gave a certificate, on each of the said copies, that the said society so applying was entitled to the benefit of the act: and one of such copies, when so certified, was returned by the said barrister to the said society; and another of the said copies, when so certified, was transmitted by the said barrister to the clerk of the peace for the county of Surrey, and by him laid before the justices of the peace for the county of Surrey at the adjournment of the general quarter sessions for the said county, held on 9th September, 1844, and by them allowed and confirmed; and such copy, so laid before the justices and allowed and confirmed, was filed by the said clerk of the peace with the rolls of the sessions of the peace in his custody on the said 9th September.

The first assessment after the certificate was filed was made on 1st October, 1844. Notice of such certificate having been granted and filed was given to the collector of the rates on a certain day in November, 1844: but there was no proof that the trustees were cognisant thereof till formal notice was given to them on 6th February, 1845.

\*733] \*The next assessment was made on the 4th March, 1845.

The notice and statement of the grounds of appeal is dated, and was served, on 7th June, 1845: and the appeal was entered and tried at the quarter sessions for Surrey, holden on 1st July, 1845.

The property in respect of which the exemption is claimed by the society consists of certain lands, houses, and buildings, belonging to The British and Foreign School Society, situate in the Borough Road, within the said district of the said parish of St. George the Martyr.

By the laws, rules, and regulations of this society, and according to which it is carried on, it is, amongst other things, provided that this institution shall be designated The Institution for promoting education of the

labouring and manufacturing classes of society of every religious persuasion ; and, for the purpose of making manifest the extent of its objects, the title of the society shall be, The British and Foreign School Society.

The rules further provide that a school is to be maintained by it to educate children. It is to support and train up young persons of both sexes, for supplying teachers to the inhabitants of all such places in the British dominions, at home and abroad, as shall be desirous of establishing schools on the British system. It is to instruct all persons, whether natives or foreigners, who may be sent from time to time for the purpose of being qualified as teachers in this or any other country. The school is to be open to the public for the purpose of exhibiting the system of teaching and training.

All schools which are supplied with teachers at the expense of this institution are to be open to the children of parents of all religious denominations.

\*Reading, writing, arithmetic, and needlework shall be taught. [\*734

It is further provided that, the grand object of this institution being to promote education in general, any application for the training of a teacher at the expense of the person thus applying will be attended to, although such intended school is not to be conducted on the extended principles of this institution.

The rules also provide for the appointment of officers, and of a committee selected from the subscribers, by whom the affairs of the society are to be managed ; and that no member of the committee shall receive any pecuniary advantage from the society, nor shall the society make any dividend, gift, division, or bonus, in money or otherwise, unto or between any of its members.

The society is carried on pursuant to these rules ; and the land and buildings are occupied for carrying into effect the purposes of the society.

The normal school for the instruction and training of teachers forms the principal part of this institution, and is divided into twelve classes, in which lectures are given :

1. On Grammar, and English Composition.
2. Elocution, Readings in prose and poetry.
3. Arithmetic and Mathematics, including, 1. The principles of arithmetic from *De Morgan* ; 2. Geometry, books 2, 3, 4, 5, and 6 of Euclid's Elements ; 3. The Elements of Algebra and Trigonometry.
4. Model lessons in Natural Philosophy, Natural History, Botany, and Chemistry.
5. Lectures on the Art of Teaching.
- \*6. Practical Simultaneous Lessons. [\*735
7. Bible Lessons.
8. A School of Design.
9. Geography and History, Ancient and Modern.

10. A lower class of Arithmetic, including the first book of Euclid's Elements, and an elementary course on Mensuration.

11. The Elements of Physics.

12. Vocal Music.

Besides this normal or training school, there are two other schools, one for boys and one for girls, each containing 200 or 300 children. These schools are used only as model schools, for the purpose of elucidating the art of teaching: and the number of children in them is large, in order to afford a sufficient scope and opportunity for the pupil teachers to instruct and put in practice the science of teaching; the object of the institution being to train up teachers who may promote education according to the particular system of this institution, both in the United Kingdom and in the colonies.

The society is supported in part by annual voluntary contributions; but the children who are admitted to the model schools pay 2*d.* weekly for the instructions they receive. And pupil teachers, admitted into the normal department, and residing in the establishment, pay the sum of 6*d.* a week towards their board, except in cases of extreme poverty, when the board and instruction are alike gratuitous. These payments do not amount to the actual expense occasioned.

There are servants paid by the society, who are occupied solely in attending upon such boarders. Grants of school books printed by the society \*736] for the purpose \*of elucidating their system of instruction, and also of stationery and school materials, are made to schools. Similar books printed by the society are sold; and occasionally books, as well as stationery and school materials, that have been purchased by them, have been resold at an advance to subscribers to schools, and other persons, applying for them for the use of schools. And, on the whole, no profit is made; there being an annual pecuniary deficit on such grants and sales, which deficit is made up out of the general funds of the society.

Stat. 10 G. 4, c. cxxviii., and the laws, rules, and regulations of the society, submitted to the said barrister and certified, and returned by him to the said society, were to be taken and referred to as part of this case.(a)

The questions for the opinion of the court were:

1. Whether the appeal in question was commenced within the proper time.

2. Whether the said British and Foreign School Society is a society established exclusively for purposes of science, literature, and the fine arts, and, as such, entitled to the certificate of the barrister, according to the provisions of stat. 6 & 7 Vict. c. 36.

If the court should be of opinion that the appeal was not commenced in time, or that, though it was commenced in time, the society was en-

(a) The above statement contains all, in the statutes or rules, that was relied upon in argument.



titled to the said certificate, the order of sessions for dismissing the appeal was to be confirmed.

But, if the court should be of opinion that the society was not entitled to the said certificate, and that the appeal was commenced in proper time, then the appeal was to be allowed, and the certificate annulled.

*\*Martin, Wallinger, and J. Clerk*, in support of the order of sessions. First, the appeal was not in time. The four months following the first assessment after the certificate was filed had expired: the only question, therefore, on sect. 6 of stat. 6 & 7 Vict. c. 36, is as to the meaning of the words "or within four calendar months next after the first assessment of such rate made after such exemption shall have been claimed by such society." It is perhaps not easy to see in what sense the word "claimed" is used: but here no claim has been made since the certificate was filed. The notices of the filing, given to the collector and the trustees in November and February respectively, cannot be claims of exemption: the claim was made by the application to the barrister, or, at latest, by the filing. Perhaps, indeed, if an assessment had been made after the certificate was granted but before it was filed, and in such assessment the society had been omitted, that might have been a claim, and the four months might have run from such assessment. But the filing clearly amounts to a claim, if no claim has been previously made. Possibly the legislature meant to provide for the case of a claim made, before the filing, by being exempted from the assessment, and to require that the appeal should, in that case, be brought earlier. It cannot have been intended that every fresh assessment should be a fresh claim; else there would practically be no limitation. The case is not like that of a settlement appeal, where there are two grievances pointed to by different statutes, and the party has an election. The legislature must here have meant the one or the other limitation to take effect according to the state of things in the particular case; as the option given by *\*stat.* 11 G. 2, c. 19, s. 19, of bringing trespass or case for an irregular distress, "at the election of the plaintiff," has been held to be only an option "according to the subject-matter of the grievance," not an option of taking either remedy in every case; *Winterbourne v. Morgan*, 11 East, 395, 401.(a) [Lord DENMAN, C. J. Perhaps if, in all assessments made after filing the certificate, the society were rated and submitted, till some one occasion on which they resisted, that resistance might be the sort of claim supposed in the statute.] It could not be contemplated that they would so submit: if they did, could they afterwards resist at all? The appeal is against the certificate, not the assessment.

Secondly, the society falls within sect. 1. It is "instituted for purposes of science, literature" and "the fine arts," "exclusively." Its main object is to prepare teachers, to teach how to teach; and that which is to be taught falls within the term science, literature, and the fine arts.

(a) See *Miles v. Bough*, 3 Q. B. 845.

One, if not the principal, intention of the legislature was to protect Mechanics' Institutes, and establishments of an analogous kind: and this establishment, in end and means, is closely analogous. The model school is merely an auxiliary to the general purpose. Its use is to train adults in communicating instruction. In *Regina v. Jones*, ante, p. 719, a society was said to be excluded from the benefit of the act because its ultimate object was religious knowledge: but here the ultimate object is instruction in literature, science, and the art of music. [PATTERSON, J. There are schools to educate children: that certainly looks like an institution for the promotion of science, unless it can be said that \*the  
\*739] main object is to instruct in the art of teaching, and that the children are only subjects for experiment and practice in the art.] Some stress may be laid on the selling of books: but the sale is at a price below the cost price. The sale of catalogues by the Royal Academy does not render the occupation of the rooms in the National Gallery beneficial, so as to create a liability to rate; *Regina v. Shee*, 4 Q. B. 2. [WILLIAMS, J. Sect. 1 does not require that the society shall be supported entirely by voluntary contributions, but "wholly or in part."]

*M. Chambers, G. Hayes, and Knapp*, contra. First, the appeal is in time. The legislature, by the second alternative in sect. 6, intended to provide for the case where a society, though it had obtained a certificate, did not at first insist on the exemption. In that case, it was probably thought advisable not to insist upon the appeal being brought within four months from the first assessment after the filing, since ultimately an appeal might not be needed at all. At any rate, it could not have been intended that the trustees for the parish should be bound by a claim of which they had never heard. It is suggested on the other side, that the legislature intended to provide for the case where an exemption was claimed before the certificate was filed: but there could be no such claim; filing the certificate is essential to the exemption. [*Wallinger*. The society becomes exempt by obtaining the certificate.]

Secondly, this is not a "society instituted for purposes of science, literature, or the fine arts exclusively." \*The purpose is to instruct  
\*740] in teaching: and teaching is, itself, no branch of science or of literature; nor is it one of the fine arts. And the instruction of the children in the model schools is one part of the main plan: if such a school be within the statute, every charity school is so: if not, then the "exclusive" purpose is negated. "Needlework" clearly falls under no one of the three heads mentioned in sect. 1. The same remark applies to "Bible lessons." The "grand object" here is declared to be "to promote education in general." The legislative exemption was intended for associations of rich men united in the pursuit of science, literature, or the fine arts. It lies upon a party claiming an exemption to bring himself closely within it: that is not done here.

LORD DENMAN, C. J. The sixth section gives two periods of limita-

tion. One is a period of four months from the first assessment after the certificate is filed; the other is a period of four months from the first assessment after the exemption is claimed. The last must, I think, mean four months from the first assessment made after the claim of exemption is brought to the knowledge of the other rate-payers.

We have therefore to consider whether this society falls within the description in the first section. It really is impossible to pronounce an opinion upon this act without expressing regret that such loose language should have been used. There can hardly be any society as to which a doubt might not be raised. I agree that, where there is, *prima facie*, a common liability on all the queen's subjects, an act of parliament creating an exemption should state plainly what the extent of the exemption is. A great hardship is otherwise imposed \*not merely on the court [\*741 but on parishioners or societies who are tempted to appeal without grounds. On looking at the words of the act, I rather incline to the view taken by Mr. *Chambers*, that they point to a kind of society which, one might be disposed to think, had the least claim to exemption; namely, a society of rich men who combine in the rational object of enjoying science, literature, or the fine arts. I also agree with Mr. *Martin* that possibly it was intended that Mechanic's Institutes should be included. That would appear to be a very proper object. But will even such institutions come within the words? And does this? I cannot bring myself to say so. The purposes of this institution are, I think, not exclusively those mentioned in the act; they comprehend also objects which probably are quite as useful, but which are not those described. I therefore cannot say that this society falls within the act. I cannot help also observing that it is not said that the barrister has jurisdiction to declare what societies are exempt; it appears only that societies which are so exempt are to have a certificate, as a *sine qua non*, in order to claim the exemption: after they have it, it seems that they are still subject to the additional difficulty of showing that they are within the act. I do not find that the certificate is more than an essential preliminary, without which the exemption cannot take effect. However, I make this remark, not for the purpose of expressing an opinion, but to show that there is a difficulty which may arise, in the hope that we may have some more distinct enactment showing us what is really meant. (a)

\*PATTESON, J. I am entirely of the same opinion. As to the question of time, I think no other interpretation can be put on the sixth section than that which has been given by my lord. Otherwise a part of the words will have no effect at all. It is clear what the first period named is; four months after the assessment next following the filing of the certificate. Then comes the word "or," which must point to something different from what has gone before. What is that something? [\*742

(a) See *Regina v. Phillips*, post, p. 745.

It cannot mean simply a claim of exemption made before the barrister. No time is limited for his decision : it might not take place till after the expiration of the four months following the assessment after the claim so made. I could understand the sixth section, if it prescribed a period of limitation dated from the claim of the benefit of the exemption ; that, however, is not so : it is from the claim of the exemption itself. But I think what was meant was the claim of the benefit of the exemption. And yet there is no provision that the society is to give notice of any kind. Still I think that the only interpretation we can put on the section is, that the four months must run from the first assessment after the benefit of the exemption has been demanded. Then, as to the question whether the society comes within the act. I cannot see how a society, established for the purpose of educating the labouring and manufacturing classes, can be said to be a "society instituted for purposes of science, literature, or the fine arts exclusively." This is an institution set on foot for the purpose of teaching how to educate. It is not material to consider whether that is itself education. Here we have also a direct machinery for education ; and, without saying any thing as to the meaning \*of the  
 \*743] words "fine arts," it is impossible to say that this society is instituted exclusively for the purposes mentioned in the act. It cannot, therefore, be taken to be such a society as was contemplated by the legislature. My lord has alluded to the difficulty arising from the statute not providing that the certificate should give the right ; and his view appears to me to be perfectly just. I am very sorry for the conclusion to which we are obliged to come ; for I think that this society has a fairer claim to exemption than those which appear to be included in the act ; but I cannot find words in the act entitling us to give it the benefit of the exemption.

WILLIAMS, J. I think that what the appellants have done brings the case within the clause which creates a period of limitation of four months after the first assessment following the claim of the exemption. Two distinct points are assigned for the periods of limitation. For the argument of the respondents it is necessary to interpret the word "or" as if it were "and." The notice given to the trustees may, I think, fairly come within the description of a claim of exemption. With respect to the larger question, I agree with the learned counsel that an exemption from a common charge ought to be clearly expressed. Undoubtedly in saying so we impose no small difficulty ; for, although the learned counsel copiously showed that this case was not within the act, they were abstemious and sparing in the extreme in showing what would come within it. We are forced at last to the conclusion, which I am sure my lord and my brother PARTESON sincerely regret, that it is exceedingly difficult to

\*744] say what the act means. We \*must see what this institution is. It is sometimes called an institution, and sometimes an establishment : those two words mean, I suppose, the same thing. Now we find that algebra, trigonometry, elocution, and poetry are to be taught : these

certainly come within the terms science and literature ; but that does not show that the society was instituted exclusively for those purposes. We must inquire what the original intent of the institution is ; and we find it to be, to teach how to educate. I cannot say that that is within the meaning of the act. I agree most fully with my lord and my brother PATTESON, that this is a society deserving exemption as well as any other, possibly much better than some of those to which my lord has alluded. But I cannot say that it is within the words of the act ; and, if this be left even doubtful, the case for the exemption is not made out.(a)

Order of sessions quashed.(b)

(a) Coleridge, J., was absent.

(b) See the next case.

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\*The QUEEN, on the prosecution of the Churchwardens and [\*745 Overseers of the Parish of BIRMINGHAM, against PHILLIPS and MELSON, Esquires, Justices of the Peace for the Borough of BIRMINGHAM.

The certificate of the barrister, under stat. 6 & 7 Vict. c. 36, (exempting scientific and literary societies from rates,) that a society is entitled to the benefit of that act, does not furnish conclusive proof that the society is so entitled.

In this case a mandamus issued, commanding the defendants to issue their warrant or warrants of distress to levy certain poor rates upon the goods and chattels of one Edward Tilsley Moore. A return was made to the writ by Moore, in the names of the defendants. The prosecutors, by their pleas, traversed certain allegations in the return ; and the issues joined upon these pleas were tried at the Warwickshire Spring Assizes, 1846, before TINDAL, C. J. ; when a verdict was found for the crown, subject to the opinion of this court upon the following case.

The poor rates in question were imposed upon Mr. Moore, as one of the subscribers to a society called “ The Birmingham News Room,” which society occupies a building in the town of Birmingham for the purposes thereof, and claims to be exempted from being rated to parochial or local rates in respect of the said building, under the provisions of stat. 6 & 7 Vict. c. 36, prior to the passing of which act the institution in question had always been rated to the relief of the poor without dispute.

In November, 1843, directly after the passing of the said act, three copies of the rules of the institution were forwarded to *John Tidd Pratt*, Esq., the barrister \*appointed to revise the rules of friendly so- [\*746 cieties in England and Wales, who thereupon certified that the society was entitled to the benefit of the said act. The said rules and certificate were duly enrolled at the quarter sessions for the borough of Birmingham on 6th January, 1844, according to the provisions of the

said act; and a copy of such certificate was delivered to the overseers of the poor, and exemption from rates claimed on 8th February, 1844. A copy of the said rules, and of the barrister's certificate endorsed thereon, accompanied and was to be taken as part of this case.

No appeal was made against the certificate by any rate-payer under sect. 6 of the said act; and the time limited for appeal against such certificate had expired before the application was made to the defendants to compel payment of three rates by warrant of distress. The overseers, however, continued to rate Mr. Moore in the rates mentioned in the writ, which were all the rates made by the parish officers prior to the application for such warrant of distress; and they have never omitted to rate him as one of the News Room subscribers in respect of the occupation of the said building by the said society. The time limited for appealing against the rates in question had also expired before the said application was made to the defendants; and no appeal had been brought in respect of the assessment made upon Mr. Moore as aforesaid.

The society in question has a news room, where many of the periodical publications and usual newspapers of the day are taken in and supplied for the perusal of the subscribers. The newspapers and other periodical publications taken in by the said society, are the London Gazette, Morning Chronicle, Times, Morning Herald, \*Globe, Standard, Daily News, Sun, Examiner, Patriot, Record, Spectator, Atlas, Economist, Athenæum, John Bull, Railway Times, Literary Gazette, and numerous local and provincial papers. The Parliamentary Votes, the Course of Exchange, Mark Lane Express, and Shipping Lists, are also supplied for the information of the subscribers; and Share Lists and Advertisements of Sales, &c., are generally laid on the tables by individual subscribers and others, for perusal.

Any individual (not personally objectionable) is permitted to become a subscriber, on complying with the rules of the society. In the library attached to the news room are three hundred volumes, comprising statistical and topographical works, the Mirror of Parliament, Statutes at Large: and two testaments are kept there, which are used occasionally by professional gentlemen, who are subscribers, in administering oaths to persons swearing affidavits before them. The commercial and general Directories, and other documents which are preserved and filed in the room, may be searched by commercial men who are subscribers, for information useful to them in their ordinary commercial pursuits.

The society is supported by the annual subscriptions of the members, at the rate of two guineas each, as mentioned in the rules: and any member declining to renew his subscription is considered as ceasing to belong to the society. No surplus of receipts over expenditure has ever arisen: but the total receipts are exhausted by the expenses of the establishment.

The news room was, with other buildings, erected from a fund subscribed in shares by the proprietors thereof, who let the news room and



library adjoining \*to news room subscribers at an annual rent. Many proprietors of the news room buildings are not subscribers to the news room: and many subscribers to the news room are not proprietors of the buildings. [\*748]

The possession of the news room and library is vested in the subscribers, subject to the rules aforesaid.

On behalf of the defendants, it was contended: That the said act of parliament takes away the power of rating or assessing any society certified by Mr. Tidd Pratt to be entitled to the benefit of the act; and that the said certificate, unappealed against, is in itself conclusive evidence that the society is entitled to exemption from payment of the rates: and, further, that it is to be deemed a society instituted for the purpose of science or literature exclusively, and supported in part by annual voluntary contributions, and one which, by its laws, might not make any dividend, gift, division, or bonus in money unto or between any of its members.

On behalf of the prosecutors, it was contended: That the society is not to be deemed a society instituted for purposes of science or literature exclusively, and supported in part by annual voluntary contributions, and one which, by its laws, might not make any dividend, gift, division, or bonus in money unto or between any of its members; and that they (the prosecutors) are not precluded by the said certificate from disputing the society's alleged right of exemption, upon those grounds, from payment of the said rates, by the provisions of the said act. And that, under any circumstances, the said rates are not void; and that the objection thereto, or the alleged claim of exemption therefrom, ought to have been raised by appeal against the said rates.

Copies of the said writ and return, and of the pleas \*traversing the return, and the issues joined thereon, accompanied and were to be taken as forming part of the case.(a) [\*749]

If the court should be of opinion that the defendants had established the claim of the said society to be exempted from payment of the said rates, on all or any of the grounds alleged in their return, and above stated, and that the claim of exemption might still be considered valid as against the rates in question, although the rates were not appealed against, the verdict found for the crown was in that case to be set aside, on all or such of the issues as the court should think fit, and a verdict entered on such issue or issues for the defendants. Otherwise the verdict found for the crown to stand.

Either party was to be at liberty to contend that the judgment should

(a) Three traverses were taken. First, that the society was not, at the time of the making and publishing, assessing or allowing, of the rates and assessments in the writ of mandamus mentioned, a society instituted for purposes of science or literature exclusively. Secondly, that the society was not, at the time of the making, &c., supported in part by annual voluntary contributions. Thirdly, that the society was not, at the time of the making, &c., a society which, by its laws, might not make any dividend, gift, division, or bonus in money unto or between any of its members.

be arrested, or that judgment should be entered non obstante veredicto, or otherwise as the court should think fit.

The case was argued in Michaelmas term, 1847.(a)

*Miller*, for the crown. This society does not satisfy the requisites of stat. 6 & 7 Vict. c. 36, s. 1. It is not "supported wholly or in part by annual voluntary contributions;" it is not "instituted for purposes of science, literature, or the fine arts exclusively;" nor is it \*pre-  
 \*750] cluded by its laws from making a "dividend, gift, division, or bonus in money" to and between its members.(b) But, for the defendants, it will be contended that the barrister's certificate, not having been appealed against, is conclusive. The requisites in sect. 1 are cumulative: unless all concur, the exemption is not given: and the certificate is only one of such requisites. As to this, the opinion both of Lord DENMAN, C. J., and PATTESON, J., was strongly expressed against the conclusiveness of the certificate, in *Regina v. Pocock*, antè, p. 741, 743. The certificate seems to have been prescribed only for the purpose of giving something like a general notice of the exemption claimed. *Welch v. Nash*, 8 East, 394, is a very strong authority against allowing the certificate to prove the exemption. The barrister has no jurisdiction except in the case of a society of the kind described in the statute: he cannot, by finding the facts wrongly, give himself jurisdiction. The certificate, by sect. 2, is to be allowed, confirmed, and filed without motion: it is made, ex parte, behind the backs of the rate-payers: no special notice is given to them afterwards: and their only means of trying the question of liability is to rate, and leave the society, which claims the exemption, to appeal. Besides,  
 \*751] even if the certificate were conclusive, it could \*be so only as to the state of facts at the time of its being granted, or, at latest, at the time of its being filed. Any subsequent alteration of the rules would put an end to the exemption; and no presumption arises that such alteration has not been made. The rates now in question must have been made four months after the certificate was filed. [COLERIDGE, J. What effect do you leave to the certificate? If the only object for requiring it was to have the rules corrected and preserved, why is the appeal against it given to the rated inhabitants? If the appeal may be brought on the ground that the society is not of the kind described in the act, and if, as you contend, that destroys the jurisdiction of the barrister altogether, why should the rated inhabitant appeal against it? Suppose, after the certificate is filed, the overseers still rate the society, as you say they may; does or does not the statutable right of appeal still rest in the rated inhabitants?]

(a) November 10th. Before Lord Denman, C. J., Coleridge, Wightman, and Erle, J.

(b) On these points, *Regina v. Jones*, (antè, p. 719,) and *Regina v. Pocock*, (antè, p. 729,) were cited: but the court expressing a strong opinion upon them in favour of the crown, the defendants' counsel declined arguing them. It was also contended, for the crown, that the magistrates were bound to issue the warrant, even if the society were exempt from rates, inasmuch as there had been no appeal against the poor-rates. On this point it became unnecessary for the court to decide. Reference was made to *Marshall v. Pitman*, 9 Bing. 595; *Governor of Bristol Poor v. Wait*, 1 A. & E. 264; *Rex v. St. Austell*, 5 B. & Ald. 693, 699.

If the society were still rated, the inhabitants would not be aggrieved, nor require a remedy, unless it be a grievance that there is a risk of the society being omitted from future rates: if that be so, they might appeal as against a present grievance. A person who became an inhabitant after such a rate had been made, including the society, would be in that sense aggrieved. [COLERIDGE, J. Do you say that, if the sessions, on appeal, confirmed the certificate, and then the overseer left the society out, there might be an appeal by the rated inhabitant?] Yes: that follows from *Welch v. Nash*. [COLERIDGE, J. Sect. 6 makes the decision of the sessions conclusive and binding. As to the annulling or not annulling the certificate; no farther. [COLERIDGE, J. Could every rated \*inhabitant appeal against the certificate in succession?] That is an extreme case. [\*752]

*Mellor*, contra. No answer has been given to the difficulty, suggested from the bench, that the argument for the crown renders the certificate nugatory. The certificate is an adjudication that, in fact, the society is within the act: and that is conclusive: for the principle of giving credit to an authority acting within its jurisdiction applies, whether the authority be attached to a higher or to a lower office; *Aldridge v. Haines*, 2 B. & Ad. 395, and the cases there cited in argument for the defendants. Sect. 2 enacts that the rules shall be submitted to the barrister "for the purpose of ascertaining whether such society is entitled to the benefit of this act:" and the barrister shall give a certificate "that the society so applying is entitled to the benefit of this act, or shall state in writing the grounds on which such certificate is withheld." Sect. 5 gives the society an appeal to quarter sessions against the barrister's refusal: sect. 6 gives the rate-payers a like appeal against the certificate; and, on such appeal, the "determination concerning the premises shall be conclusive and binding on all parties to all intents and purposes whatsoever." The duty intrusted to the barrister is clearly judicial, not ministerial only. *Welch v. Nash* has been cited on the other side; but that case has been much questioned, or, at least, its application much restricted.<sup>(a)</sup> The true test, as to the jurisdiction of a court or other authority to decide on facts, is, whether there be jurisdiction to begin the inquiry into the \*existence of the facts; *Regina v. Bolton*, 1 Q. B. 66, where *Brittain v. Kinnaird*, 1 Brod. & B. 432, *Basten v. Carew*, 3 B. & C. 649, and *Cave v. Mountain*, 1 M. & G. 257, were cited; *Regina v. Hickling*, 7 Q. B. 880; *Mould v. Williams*, 5 Q. B. 469. The language of Lord DENMAN, C. J., and PATTESON, J., in *Regina v. Pocock*, ante, p. 741, 743, which has been referred to, was not decisive, and was, besides, extrajudicial; and the point had not been argued. [COLERIDGE, J., referred to the Friendly Societies' Acts.] There the barrister certifies whether the rules are calculated to effect the intention of the parties, and conformable to law; <sup>(b)</sup>

(a) See *Brittain v. Kinnaird*, 1 Br. & B. 432, 441; *Gray v. Cookson*, 16 East, 13, 23.

(b) See stat. 4 & 5 W. 4, c. 40, s. 4.

here he is to decide whether the society "is entitled to the benefit of this act." The case is much like that of an order of removal: the certificate, if not appealed against, or if confirmed on appeal, is conclusive, unless it be shown that a new state of things has arisen; and this exception suggests the answer to a difficulty urged by the other side, that the rules may have been changed since the certificate was granted. The change would, if shown, do away with the effect of the certificate, unless a fresh certificate were applied for within a month, under the provision in sect. 3.

*Miller*, in reply. The barrister had no right to enter upon the inquiry except in the case of a society falling within the description in sect. 1: therefore, according to the test adopted in *Regina v. Bolton*, and *Regina v. Hickling*, his jurisdiction never attached. [Lord DENMAN, C. J. It \*754] may be that, if the rules certified "do not justify the certificate, and thus, on the face of the document, the premises do not support the conclusion, the case would be brought within the principle of *Welch v. Nash*.] Sect. 6 makes the determination of an appeal conclusive; whatever the effect of that is, there is no such conclusiveness where there is no appeal; for the maxim "expressio unius est exclusio alterius" applies. [COLERIDGE, J. The reason why an order of removal, if not appealed against, is conclusive, is, not that there is any statutory provision to that effect, but because it is the decision of a competent tribunal.] There the order is made upon evidence given on oath; and notice is given to the opposite party. *Cur. adv. vult.*

COLERIDGE, J., (a) in Hilary vacation, 1848, (February 26th,) delivered the judgment of the court.

At the time of the argument of this case, the court intimated their opinion that, upon the facts, without the certificate, the society did not appear to them to be instituted for the purposes of science or literature exclusively, nor to be a society which might not, by its laws, make any dividend or gift. The case for the society was then rested on the effect of the certificate of the barrister, which was contended to be conclusive, either as the decision of a tribunal or commissioner having jurisdiction over the question, or as a decision made conclusive by the statute. But, on examining the statute, the certificate appears to us to be made a condition precedent to the claim of exemption, but not conclusive proof of a right thereto.

\*755] \*The first section exempts from ratability persons occupying a building for purposes of science, literature, or the fine arts exclusively, provided it shall be supported wholly or in part by annual voluntary contributions, and shall not, and by its laws may not, make dividends between its members, and provided such society shall obtain the certificate of the barrister.

The purposes of the society, the contributions, the absence of dividends and the law against dividends, and the certificate, are conditions in equal

(a) Lord Denman, C. J., was absent.

degree to the right of exemption. Under this section, the claim of the right may be defeated on default of either condition; and the presence of one raises no presumption against the absence of any or either of the others. Also, as the making a dividend at any time would defeat a right of exemption which had existed, it is absurd to suppose that a past certificate was made conclusive proof that a future dividend shall not exist. Nor is the certificate rendered conclusive by the sixth section, which gives an appeal from the decision of the barrister, granting it to any person assessed to a rate and giving notice of the grounds of appeal, and empowers the court to annul the certificate, and makes the determination of the court upon the premises binding and conclusive upon all parties to all intents. In the first place, there has been no appeal against this certificate; and the section does not apply. Moreover, in cases of appeal, the inquiry is confined to the grounds stated in the notice of appeal; and the decision is confined to annulling or not on these grounds. If it is annulled, it is conclusive; if not, the certificate remains as valid as before the appeal.

The ill consequences, from holding a certificate not \*annulled in respect of one ground of objection alleged by one appellant to be conclusive proof of a right of exemption for all time against all persons, and notwithstanding other objections, make it improbable that parliament intended to give it that effect: and the words do not express such an intention: the determination by the sessions, that a certificate shall not be annulled on account of the alleged objections, may be conclusive, and the certificate may fulfil the condition requiring a certificate, without having the effect of either fulfilling the other conditions or conclusively proving them. Sect. 5 gives an analogous appeal in case of refusal of certificate by the barrister, and makes the filing of the rules of the society by order of the court to have the same effect as if the barrister had certified, that is, the same effect which a certificate has if it is not annulled upon appeal under sect. 6. But no conclusive effect is given to such judgment on appeal. [\*756]

Therefore, we are of opinion that the claim of exemption is not sustained by the certificate, nor by the other facts of the case; and it follows that the verdict should be for the crown on all the issues.

Verdict to be entered for the crown.

\*757]

## \*PERRY against FITZHOWE.

Declaration in trespass alleged that defendant broke and entered plaintiff's dwelling-house in which he and his family were then dwelling and actually present, and, while they were therein, pulled down and demolished the same.

Plea, that defendant was entitled to common of pasture on close H., for sheep levant and couchant, &c., as appurtenant to land of which he was the occupier; and that, because the dwelling-house was wrongfully erected on the said close, so that, without breaking and entering, &c., and pulling down and demolishing, the said dwelling-house, he could not enjoy his said common, defendant broke and entered, &c., and pulled down and demolished the dwelling-house, &c., doing no unnecessary damage, &c.

Replication. That the dwelling-house, at the times when, &c., was the dwelling-house of plaintiff, and in the actual occupation of plaintiff and his family, who were actually present in, and inhabiting the same, and that defendant, at the times when, &c., *with force and arms and with a strong hand and in a violent manner* broke and entered, &c., and committed the trespasses.

*Held*, on demurrer to the replication,

1. That the replication was bad, because it did not add any thing material to the complaint in the declaration.
2. That, the house being an obstruction to defendant's enjoyment of his common, he might have justified abating so much of it as caused the obstruction, if no person had been therein.
3. But that the justification here was not maintainable, since it appeared by the pleadings that the plaintiff's family were in the house when defendant pulled it down.
4. *Quære* whether the plea was bad because it did not aver notice to the plaintiff to abate the nuisance himself.

The second count alleged that defendant with force and arms expelled, put out and removed plaintiff and his family from the possession and occupation of plaintiff's dwelling-house, and kept them so expelled, &c., for a long time, &c.

Plea, an immemorial right of common on close H., appurtenant, &c., as above, and that, because the house was unlawfully erected on the close, so that, without pulling it down, defendant could not enjoy his common, defendant pulled down, prostrated and removed the house, and in so doing necessarily expelled, put out and removed plaintiff and his family from the possession and occupation, and kept them so expelled, &c., doing no unnecessary damage, &c.

Replication. That, before the time, &c., and before the land in the plea mentioned came to defendant, H., being seised in fee and occupier of the said land, granted license to plaintiff to fence off part of close H., and build a dwelling-house on such part; and that, before the time when, &c., plaintiff, in pursuance of such license, fenced off such part, and built thereon the dwelling-house mentioned in the 2d count, and in so doing laid out large sums of money, &c. And that, afterwards, the said land, and H.'s estate and interest therein, came to and vested in defendant, and the said land is that in respect of which defendant claims common.

*Held*, on demurrer to this replication:

5. That the replication was bad, because it alleged a parol grant by H. to plaintiff of a freehold interest running with the inheritance; which grant, without deed, could not bind the defendant, a stranger. Whether or not it bound the grantor, *quære*.
6. That the plea could not be construed as alleging that defendant pulled down the house while the family were absent, so that they could not return to it, and thereby were expelled: and, therefore, that the plea was bad, because it justified the expulsion as made in pulling down the house, which was unjustifiable while plaintiff's family were therein.

TRESPASS. The first count of the declaration stated that the defendant, on, &c., and on divers other days, &c., with force and arms, broke and entered \*a certain dwelling-house of plaintiff, situate, &c., "in which said dwelling-house the said plaintiff and his family, to wit, Sarah the wife, and James and John the children, of the plaintiff, were at the said several times inhabiting and actually present," and then, to wit, on, &c., made a great noise, &c., and continued, &c., and then forced and broke open divers, to wit, ten, doors, &c., and broke to pieces

\*758]



divers, to wit, ten locks, &c., of plaintiff, and also then, and while the said family of plaintiff were in the said dwelling-house, pulled down, prostrated, and destroyed the chimneys, roof, walls, &c., and other parts of the said dwelling-house, and also then pulled down, &c., certain fixtures and things of plaintiff, to wit, &c., of great value, to wit, &c., then affixed to and part of the said dwelling-house, and also then, and while the said family of plaintiff were in the said dwelling-house of plaintiff as aforesaid, pulled down, prostrated, and demolished the said dwelling-house, and also, during the time aforesaid, to wit, on, &c., seized and carried away, and converted, &c., the materials, &c. By means of which premises the plaintiff, during all the time aforesaid, lost and was deprived of the use and benefit of his said dwelling-house, and was put to great expense, to wit, &c., in procuring and removing to another residence for himself and his family, and was prevented from carrying on his business, &c.

Plea 1, to the 1st count. That, before and at the said times, &c., defendant was, and thence hitherto has been, and still is, the occupier of a certain messuage and divers, to wit, 150 acres of land, with the appurtenances, situate, &c., and that defendant, whilst he was such occupier, and all the occupiers for the time being, &c., for the full period of thirty years next before the first \*of the said times when, &c., and [\*759 next before the commencement of this suit, have respectively actually taken and enjoyed as of right, and without interruption, and have used and been accustomed to actually take, &c., and ought to have actually taken, &c., and defendant, occupier, &c., still of right ought, &c., for himself and themselves, occupiers, &c., common of pasture in, upon and throughout a certain close, situate, &c., called The Heath, for all his and their commonable sheep levant and couchant in and upon the said messuage, &c., every year and at all times of the year, as to the said messuage, &c., belonging and appertaining. And, because the said dwelling-house in the first count mentioned, at the said several times when, &c., in that count mentioned, had been and was wrongfully erected, standing and being in and upon the said close, so that without breaking and entering the said dwelling-house, and a little forcing and breaking open the said doors, &c., in the said first count mentioned, and a little breaking to pieces, &c., the said locks, &c., and pulling down, prostrating, and destroying the said chimneys, roof, walls, &c., and other parts, &c., in the said first count mentioned, and a little pulling down, &c., the said fixtures and things of plaintiff, in the said count mentioned, and pulling down, prostrating, and demolishing the said dwelling-house, the defendant could not have, use, or enjoy his said common of pasture in, upon and throughout the said close in so ample and beneficial a manner as he otherwise might and would and ought to have done, defendant, at the said several times when, &c., broke and entered, &c., and then a little forced and broke open, &c., the said doors, &c., and a little broke

to pieces, &c., the said locks, &c., and pulled down, &c., the said chim-  
 \*760] neys, &c., and a little \*pulled down, &c., the said fixtures, &c.,  
 and pulled down, prostrated, and demolished the said dwelling-  
 house, and in so doing did necessarily and unavoidably make a little  
 noise, &c., in the said dwelling-house, and necessarily, &c., continued  
 therein making such noise, &c., for a certain reasonable space of time,  
 &c., and then seized and took the materials of which the said dwelling-  
 house was composed, &c., and carried them to a certain small and con-  
 venient distance in that behalf, where he left the same for the use of the  
 plaintiff, he the defendant doing no unnecessary damage to the plaintiff  
 on the occasions aforesaid, as he lawfully, &c. : which are the said several  
 alleged trespasses, &c. Verification.(a)

2d plea, to the 1st count. Prescribing in respect of an enjoyment for  
 sixty years ; but in other respects not differing from the 1st plea.

3d plea, to the 1st count. Stating a seisin in fee of the messuage, &c.,  
 and an immemorial prescription : in other respects not differing from  
 the 1st and 2d pleas.

Replication to plea 1. That the said dwelling-house, in the said first  
 plea and in the said first count mentioned, “ was, at the said several times  
 when, &c., in the said first plea mentioned, the dwelling-house of the  
 plaintiff, and in the actual possession and occupation of the plaintiff and  
 his family, who were, at the said several times when, &c., in the said  
 first plea mentioned, actually present in and inhabiting the same ; and  
 that the said defendant, at the said several times when, &c., in the said  
 first plea mentioned, with force and arms, and with a strong hand and in  
 a violent manner, broke and entered the said last-mentioned dwelling-  
 \*761] house of the \*plaintiff, and committed the said several trespasses  
 in the said first count mentioned.” Verification.

To pleas 2 and 3, the like replication.

Demurrer to the replication to plea 1, assigning for cause, among others,  
 that the replication alleges and states no new matter, and ought not to  
 have concluded with a verification. Joinder. The replication to the  
 2d and 3d pleas was demurred to on the same, among other grounds.  
 Joinder.

The 2d count of the declaration stated that defendant, on, &c., “ with  
 force and arms expelled, put out and removed the plaintiff and his family  
 from the possession and occupation of a certain other dwelling-house of  
 the plaintiff, situate, &c., and kept them so ejected and expelled for a  
 long space of time, to wit, from thence hitherto. The count also alleged  
 a seizure, damaging and conversion of goods, &c., being in the dwelling-  
 house. By means whereof, &c. : averment of damage nearly as in the  
 first count.

Pleas 4 and 5, to the 2d count. Prescribing for common as appertain-

(a) The plea made no reference to the averment that the plaintiff's family were in the house.

ing to the messuage, &c., in respect of a thirty and a sixty years' enjoyment, and justifying as in the 6th plea, (post.) Verification.

Plea 6, to the 2d count. Stating, as in plea 3, an immemorial prescription for common over the close called The Heath, as appertaining to a messuage and land, &c. And that, because the said dwelling-house in the said last count mentioned, before and at the said time when, &c. in that count mentioned, had been, and then was, wrongfully and unlawfully erected, standing and being in and upon the said last-mentioned close, so that without prostrating, pulling down, and removing the same, he the defendant could not have, use or enjoy \*his said last-mentioned common of pasture in, upon and throughout the said last-mentioned close, in so ample and beneficial a manner as he otherwise might and would and ought to have done, he the defendant, at the said time when, &c., pulled down, prostrated, and removed the said last-mentioned dwelling-house, and the materials, thereof coming and arising, and of which it had been composed and built, then took and carried to a certain small and convenient distance in that behalf, where he left the same for the use of the plaintiff; "and in so doing, he the defendant did necessarily and unavoidably expel, put out, and remove the plaintiff and his said family from the possession and occupation of the said last-mentioned dwelling-house, and kept them so ejected and expelled hitherto," and then seized and took the said goods and chattels, &c., being in the said last mentioned dwelling-house, and carried them to a certain other small and convenient distance where he left them, &c., and in so doing he did necessarily and unavoidably a little break, &c. the said goods and chattels, he, defendant, doing no unnecessary damage to plaintiff on the occasion last aforesaid, as he lawfully, &c. Which said expelling, &c., (enumerating the trespasses,) are the said several alleged trespasses, &c. Verification. [\*762]

Replication to pleas 4 and 5, tendering issue on the enjoyment alleged in those pleas respectively; on which issue was joined.

To plea 6. "That, long before the said time when, &c. in the said 2d count mentioned, and before the said messuage and land in the said 6th plea mentioned came to the defendant, to wit, on, &c., "one Richard Howe was seised in his demesne as of fee of and in the said last mentioned messuage and land, and was the occupier \*of the same, and, being so seised and such occupier as aforesaid, he the said R. H. did then, to wit, on," &c., "give and grant to the said plaintiff leave and license to shut in, fence off, and enclose from the said close in the said 6th plea mentioned, a certain part, to wit, 60 poles, thereof, and to erect and build a dwelling-house, and other buildings on the said part, to wit, the said 60 poles; and that the said plaintiff did, by and in pursuance of such leave and license, afterwards, and before the said time when, &c. in the said 6th plea mentioned, shut in, fence off and enclose from the said close in the said 6th plea mentioned the said part, to wit, [\*763]

the said 60 poles, and erected and built thereon, to wit, on the said part so enclosed as aforesaid, the said dwelling-house in the said 2d count, and in the said 6th plea mentioned, and in so shutting in, fencing off, and enclosing the said part, to wit, the said 60 poles, and erecting and building the said dwelling-house in the said 6th plea mentioned, did necessarily lay out and expend divers large sums of money, amounting in the whole to divers, to wit, 500 pounds." Averment: "that the said messuage and land in the said 6th plea mentioned, and the estate and interest of the said R. H. of and in the same after the giving of such leave and license as aforesaid, and after the said part was so shut in, fenced off, and enclosed as aforesaid, and after the said money was so expended in that behalf as aforesaid, came to and vested in defendant, and is the messuage and land, and the estate and interest, in respect of which the defendant claims such right of common as in the said 6th plea is alleged." Verification.

Demurrer to the replication to plea 6, alleging (among many other \*764] grounds) that the leave and license could \*be granted only by deed, and no deed is stated nor profert made; that the license, as pleaded, is void in law; that Richard Howe is not shown to have had any right of common or other easement on any part of the close mentioned in the plea at the time of granting the supposed leave and license; and that the replication argumentatively denies that defendant, at the time when, &c., had right of common on the part of the close fenced in by plaintiff. Joinder.

The demurrers were argued in Easter term, 1845.(a)

*Gunning*, for the defendant. The first three pleas and the last are well pleaded; and the replication is no answer. [Lord DENMAN, C. J. Can you maintain pleas which justify pulling down a house in which the plaintiff and his family were, without alleging a previous notice to them to go out?](b) No trespass affecting the person is complained of. As to the first set of demurrers: the plaintiff, by his replication, admits that the dwelling-house mentioned in the first count and first three pleas was wrongfully erected on land over which the defendant had right of common. That was a nuisance, which, on general principles, the party injured might abate, whether consisting in a house, a hedge or any other obstruction: *Penruddock's Case*, 5 Rep. 100 b; *Baten's Case*, 9 Rep. 53 b; *Rex v. Rosewell*, 2 Salk. 459; 3 Bla. Com. 5, book 3, c. 1, § 4. The replication adds nothing material to the complaint in the first count.

\*765] It alleges that the defendant, at the \*times when, &c., "with force and arms, and with a strong hand, and in a violent manner, broke and entered" the dwelling-house. If it was intended by these words to impute a forcible entry made punishable by statute, the words "against the form of the statute" are wanting; if a forcible entry at

(a) April 25th and 29th. Before Lord Denman, C. J., Patteson, Williams, and Wightman, J.

(b) This objection was stated, among others, in the points for argument delivered by the plaintiff.

common law, the averments fall short of the legal description, as appears from *Rex v. Wilson*, 8 T. R. 357. There the words “with force and arms,” and “with a strong hand,” would have been insufficient if the indictment had not stated an entry made unlawfully, (that is, as Lord KENYON explained it, p. 364, without title,) by the defendants, in such manner as of itself implied danger to the peace. The entry, to be criminal, must be forcible and unlawful: and, after an entry which is not so, even a detaining with strong hand and armed power is not a statutory offence; *Rex v. Oakley*, 4 B. & Ad. 307. In 2 Hawk. P. C. 29, 7th ed., b. i. c. 64, the author says, “It seems that at the common law a man disseised of any lands, or tenements, (if he could not prevail by fair means,) might lawfully regain the possession thereof by force, unless he were put to a necessity of bringing his action, by having neglected to re-enter in due time.” Mr. Curwood, in his edition, (1 Hawk. P. C. 495, note (1),) questions this general doctrine: but the subsequent proposition seems clearly to be correct, (2 Hawk. P. C. 29, 7th edition, b. i. c. 64, s. 3,) that in an action under statute for a forcible entry, “if the defendant make himself a title which is found for him, he shall be dismissed without any inquiry concerning the force,” “howsoever he may \*be punishable at the king’s suit, for doing what is prohibited by statute.” [ \*766

Dalt. Just. 208, p. 268, in ed. 1655, c. 80, is to the same effect: and *Taylor v. Cole*, 3 T. R. 292, (judgment affirmed in Exc. C. 1 H. Bl. 555;) *Taunton v. Costar*, 7 T. R. 431; and *Turner v. Meymott*, 1 Bing. 158, all show that a party may, without legal process, retake possession of his own premises occupied by another, and is not civilly responsible unless he has mistaken his right, nor criminally unless he has made a forcible entry, or committed some other violence for which a prosecution lies. *Newton v. Harland*, 1 M. & G. 644, may be cited as showing that a landlord cannot, in a civil action, justify re-entering, of his own authority, upon a tenant whose term has expired; but the judges there were not unanimous, COLTMAN, J., expressing himself strongly in favour of the defendants’ right to justify in a civil action; and the case was in some respects distinguishable from this. The defendant, therefore, in the present case, might enter to abate the nuisance under the circumstances stated in the replication, and although the plaintiff’s family were on the premises, no injury being done to the person of any individual.

The replication to plea 6 is bad, first, because it does not show that Howe, at the time of the alleged grant to the plaintiff, had any right in the common. Secondly, if he was a commoner, and, as such, could give the license relied upon, (which is questionable; *Monk v. Butler*, Cro. Jac. 574, 575,) the license ought to have been granted by deed, since it is supposed that a freehold interest in the land passed; *Monk v. Butler*; *Hewlins v. Shippam*, 5 B. & C. 221; \**Wallis v. Harrison*, 4 M. & W. 538; and *Wood v. Leadbitter*, 13 M. & W. 838; where preceding cases are discussed and explained, and the authority [ \*767

of *Tayler v. Waters*, 7 Taunt. 374, is denied. That being so, the replication ought to have shown that there was a deed, and made profert of it. [*O'Malley*, contra, admitted this to be so, provided a deed were necessary.] Further, the right of soil is distinct from the right of common, Com. Dig. *Common* (H); and the replication does not show that Howe had any interest in the common, or that such interest passed from him to the plaintiff. And again, even if that were otherwise, the parol license (assuming such license to be valid) would have determined when Howe died and the land vested in another; *Wallis v. Harrison*. Such a license, though acted upon, was revocable, *Cocker v. Cowper*, 1 Cro. M. & R. 418, S. C. 5 Tyr. 103, and was revoked by the change of proprietors.

*O'Malley*, contra. The replication to plea 1 is good. The claim by a commoner to enter upon a dwelling-house, as appears to have been done in this case, is unprecedented. First, the right to abate is not clearly shown. Secondly, the right could not be exercised on a dwelling-house occupied by a family, without notice to them. Thirdly, the right, if it existed, being exercised in a violent manner, was unlawfully exercised. "Abatement," as EYRE, C. J., observes, in *Kirby v. Sadgrove*, 1 B. & P. 13, 18, "ought to be allowed in very few cases; for the abater is judge in his own cause." And, as appears from the same case, and from \*768] *Sadgrove v. Kirby*, 6 T. R. 483, in \*this court, the assumption of right will be looked at with peculiar strictness where, if it be used unwarrantably, the original state of things cannot be restored. Supposing that, under different circumstances, the plaintiff here could not have brought trespass on the ground of right in himself, yet there is no authority by which the defendant can justify such an entry as appears by these pleadings. The dictum of Hawkins, that at common law a party might retake possession of his own land by force, was treated as doubtful by Lord KENYON in *Rex v. Wilson*, 8 T. R. 364. And in none of the cases where a retaking without authority of law has been held justifiable was there a real forcible entry. In *Turner v. Meymott*, 1 Bing. 158, the premises were locked up and empty, after expiration of a notice to quit. On the other hand, in *Hillary v. Gay*, 6 Car. & P. 284, where a notice to quit had expired, but the tenant's family remained on the premises, and the landlord turned them out, Lord LYNDBURST, C. B., held that, on that ground, the case was distinguishable from *Turner v. Meymott*, and the alleged trespass not justifiable. Lord KENYON and ASHHURST, J., when they maintained, in *Taylor v. Cole*, 3 T. R. 292, that an entry and expulsion by the party entitled might be justified in a civil action, expressly guarded against the application of that doctrine to a case in which criminal violence is used. In *Taunton v. Costar*, 7 T. R. 431, and in *Butcher v. Butcher*, 7 B. & C. 399, which was a similar case, there was no entry with violence to any person. And in both cases it was considered a material question, whether or not the party entering had



such a right in the land as made an \*action of trespass maintainable. [WIGHTMAN, J. Can the replication, here, that the defendant “with force and arms, and with a strong hand, and in a violent manner, broke and entered,” make that a trespass which did not appear to be so before?] It shows that the act done was an offence within the statutes of forcible entry. [WIGHTMAN, J. Ought not the plaintiff to have new assigned, as is suggested by BULLER, J., in *Taylor v. Cole*, 3 T. R. 297?] The replication here is like a replication of abuse. The plaintiff says that, if the defendant had a right to abate the alleged nuisance, he had no right to do it with violence and a strong hand. [WIGHTMAN, J. If the plaintiff had at once demurred to the first plea, would it have been maintainable or not?] It might depend upon the question whether or not the allegations unanswered in the plea were introduced prematurely in the declaration. But the plaintiff, in replying, was at liberty to answer the plea as if those allegations in the first count, which denote criminal violence, had been mere matter of aggravation, and to reply the illegal violence and the presence of the plaintiff’s family as facts excluding the defence offered by the plea. It must then be determined, upon the matter appearing by the whole record, whether the defendant exercised a right of abating in a manner forbidden by the statutes. And on this point *Hillary v. Gay*, 6 Car. & P. 284, and *Newton v. Harland*, 1 M. & G. 644, are decisive. The words, “with a strong hand,” of themselves import undue force, and differ in this respect from the common words “vi et armis.” Such was the opinion of LAWRENCE, J., in *Rex v. Wilson*, 8 T. R. 362. It is sufficient, however, that the replication here states the trespasses “to have been committed when the dwelling-house was “in the actual possession and occupation of the plaintiff and his family,” “actually present in and inhabiting the same,” and no previous notice to them appears. It has been said that a horse cannot be taken to the pound as damage-feasant when a rider is on his back; *Storey v. Robinson*, 6 T. R. 138: on the same principle a man may abate a nuisance without legal process, but not so as to risk breaking the peace by a personal collision. The law on these subjects may be collected from 2 Bac. Abr. tit. *Distress* (B), (F), pp. 696, 707, 708, 7th ed., *Sunbolf v. Alford*, 3 M. & W. 248, and *Collins v. Renison*, Sayer’s Rep. 133. [Lord DENMAN, C. J. In the last case the act was a direct trespass to the person.] The judgments of the court maintain the general doctrine now contended for. Whether the want of defence here be apparent on the plea or on the whole record after replication, the plaintiff is entitled to judgment on this point. [PATTERSON, J. The second count does not aver that the plaintiff’s family were in the house.] The 6th plea admits that the defendant pulled down the dwelling-house, and, in so doing, did necessarily “expel, put out and remove the plaintiff and his said family from the possession and occupation” of it. If this means only that the family were kept out, the required

allegation is certainly not made ; but the words clearly imply more : an expelling, in the sense of merely precluding from entrance, does not apply where the house has ceased to exist.

As to the replication to plea 6 : assuming the plea to be good, the replication is a sufficient answer. The \*argument founded on  
 \*771] *Wallis v. Harrison*, 4 M. & W. 538, is that Howe might have revoked the license granted to the plaintiff by conveying the land to some one else, and that, consequently, it was revoked when the land devolved upon the defendant. But here the license, though by parol, was not revocable. *Wood v. Leadbitter*, 13 M. & W. 838, and other cases, showing that a party cannot grant license to have an easement over his land without deed, are not disputed. But this was not the granting of an easement over Howe's land ; for it does not appear that either Howe or the plaintiff had any interest in the soil of the close : it was merely the relinquishment of a right which Howe enjoyed over a particular subject-matter, not land. And, where the license is for an easement which is not to be enjoyed on the licensor's land, the grant need not be by deed. This distinction is borne out by *Winter v. Brockwell*, 8 East, 308, *Liggins v. Inge*, 7 Bing. 682, and the cases, generally, on the subject of such grants ; it seems to be recognised on both sides in argument in *Bridges v. Blanchard*, 1 A. & E. 536, and also to be contemplated in Gale on Easements, p. 20, part 1, c. 3, s. 1, where it is said that a parol license " may work the extinguishment of an existing easement—as where permission is given to a man to erect something on his own land which is incompatible with the continuance of some easement over it, to which the licensor was entitled." *Harvey v. Reynolds*, 12 Price, 724, much resembles the present case : there the plaintiff, who was entitled to common in respect of a messuage and land, declared against the defendant  
 \*772] for building on \*the common, but was nonsuited on evidence showing a parol consent to the encroachment ; and the Court of Exchequer discharged a rule for setting aside the nonsuit. The replication here states that the plaintiff, in pursuance of the license, built the dwelling-house ; and all the cases recognise the principle that a license executed is not to be revoked : *Wood v. Leadbitter*, 13 M. & W. 838, affords no exception. And, as to the question what is or is not execution of a license, there is a clear distinction. If the license only enables a party to do single acts, as to go upon land, from time to time, when he has occasion, there is not, at any time, such an execution of the license as prevents its being revoked. But, if it be executed by some act of such a nature that, when it is done, the party could not, on revocation of the license, be replaced in the situation he was in before, as where he has built a house, the license is not revocable. *Wallis v. Harrison*, 4 M. & W. 538, is a case of the former kind. The distinction is exemplified by *Wood v. Manley*, 11 A. & E. 34 ; *Mason v. Hill*, 5 B. & Ad. 1, and *Harvey v. Reynolds*, 12 Price, 724. If the plaintiff's right, under

the license, was even doubtful, *Kirby v. Sadgrove*, 1 B. & P. 13, shows that the defendant ought not to try such a question by the summary course of abating.

*Gunning*, in reply. As to the observation that the plaintiff's family were on the premises and had no notice, the averments as to the family in the declaration are mere matter of aggravation, and the defendant was not called upon to answer them at all; note (3) to *Earl of Manchester v. Vale*, 1 Wms. Saund. 28 c, 6th ed. [Lord DENMAN, [\*773 C. J. It is not alleged that the defendant knew whether any person was on the premises or not.] *Kirby v. Sadgrove*, 1 B. & P. 13, decides only that a commoner must not prejudice the lord's right in the soil for the purpose of removing something which may be an injury to his own right of common. *Collins v. Renison*, Sayer's Rep. 138, was a case of direct injury to the person; and, if the party injured was trespassing on the defendant's premises, the act done (throwing him down from a ladder which he had placed there) was not calculated to remove him from the premises. *Storey v. Robinson*, 6 T. R. 138, where the horse was distrained damage feasant while ridden by the plaintiff, was also a case of direct violence against the person. This case, and *Field v. Adames*, 12 A. & E. 649, and *Sunbolf v. Alford*, 3 M. & W. 348, proceeded upon the principle since affirmed in *Newton v. Harland*, 1 M. & G. 644, but do not affect the present case. And the objection to summary process as tending to personal collision is regarded strictly by the courts, as appears from *Bunch v. Kennington*, 1 Q. B. 679, and *Wagstaff v. Clack*, 2 Harrison's Digest, 2468, 3d ed.(a) The general authority of a commoner to abate enclosures which interfere with his right is confirmed by *Arlett v. Ellis*, 7 B. & C. 346. As to the alleged license from Howe: *Winter v. Brockwell*, 8 East, 308, and *Liggins v. Inge*, 7 Bing. 682, where the licensor [\*774 merely assented to the doing of something on the licensee's own land, bear no analogy to this case, where the soil affected by the license was not Howe's, and does not appear to have been that of his licensee. In *Harvey v. Reynolds*, 12 Price, 724, neither party had any property in the soil; the court appears to have thought that a license by deed was not necessary, and that the plaintiff's conduct was a virtual assent to the defendant's encroachment. That case, if rightly decided, does not govern the present, where no act implying assent has been done by the defendant. *Wood v. Manley*, 11 A. & E. 34, also differs essentially in its circumstances from the present case. *Cur. adv. vult.*

LORD DENMAN, C. J., in this term, (May 7th,) delivered the judgment of the court.

This was an action of trespass for breaking and entering the dwelling-house of the plaintiff in which he and his family were inhabiting and actually present at the time, and pulling down and demolishing it. There

(a) The statement is as follows: "A horse may be distrained damage feasant, although he is led by a person at the time." *Wagstaff v. Clack*, Cambridge, Summer Assizes, 1826, MS

was a second count for an expulsion of the plaintiff and his family. (His lordship then stated the material parts of the subsequent pleadings, and continued as follows.)

With respect to the replications to the three pleas to the first count, it is to be observed that the only addition they make to the statement in the declaration is, that the defendant, “with a strong hand and in a violent manner,” broke and entered the house and committed the trespass.

The question substantially turns upon the validity of the pleas; for the  
 \*775] replications do not state that the \*defendant used more force than was necessary, or that he came armed or with numbers of people, or used threats or menaces; and the allegation that the defendant, with a strong hand and in a violent manner, committed the trespasses, does not really alter his case as stated in the declaration, or carry it farther and convert that into a trespass which would not otherwise be a trespass.

In order to determine the validity of the pleas, it is to be considered whether the defendant could lawfully pull down the defendant’s dwelling-house (he and his family being in it at the time) because it had been wrongfully erected upon a place over which the defendant had a right of common, and which right was wrongfully infringed by the erection of the house.

There is no doubt, as a general rule, that a person who is injured by a private nuisance may abate it. In Jenkins’s Centuries, 260, cent. 6, case 57, *Penruddock’s Case*, 5 Rep. 100 b, and *James v. Hayward*, 1 (W.) Jones, 221, 222, it is said that if a house be erected to the nuisance of another, it may be abated, but that no more is to be pulled down than is necessary, and, therefore, if part only of the house be a nuisance, that part only shall be pulled down. In the case of *Rex v. Rosewell*, 2 Salk. 459, which was much relied upon in the argument, the court held, in conformity with the older authorities, that, if a person builds a house so near that of another that it stops his lights or shoots water upon his house, the person injured may enter upon the owner’s soil and pull it down. The case of a commoner falls within the general rule; and, if there be any  
 \*776] erection upon the place over which he has the right, and which \*prevents his exercising it, he may abate it so far as is necessary for the exercise of his right; *Mason v. Cæsar*, 2 Mod. 65; *Arlett v. Ellis*, 7 B. & C. 346.

No case has been found which establishes any distinction arising from the nature of the building which obstructs the exercise of a right; and, therefore, it may be assumed that the pulling down a house, provided no person be in at the time, may be justified, as much as the pulling down a barn or any other building.

In this case, however, the declaration expressly alleges that the plaintiff and his family were in the house at the time when it was pulled down; and the question is whether that circumstance renders the pulling down unlawful. No express authority on this point is to be found: but it is

said that the law respecting distresses, in which, as in the abatement of a nuisance, the party injured takes the remedy into his own hands, affords an analogy by which we ought to be guided. The law certainly forbids the distraining a horse on which a man is riding, or tools which he is using, on account of the imminent risk of a breach of the peace taking place if such a distress be made. Surely the risk of a breach of the peace is much more imminent in the case of pulling down a house in which persons actually are at the time. It is obvious that the act done is, under such circumstances, probably dangerous to human life, and calculated in the highest degree to excite violence and breach of the peace. The law will not permit any man to pursue his remedy at such risks: and therefore we think it unnecessary for the plaintiff to show that there was an actual breach of the peace: and the imminent \*risk of it is sufficiently shown by the averment in the declaration that the plaintiff was in his own house at the time when the defendant committed the act complained of. [\*777]

It was argued that the plea contains no averment of notice to the plaintiff, or demand that he would himself abate the nuisance: but we do not think it necessary to say any thing on that head, our opinion being that, for the reasons already given, the three pleas to the first count are insufficient, and that the plaintiff is entitled to judgment on the demurrer to the replications to those pleas.

With respect to the replication to the sixth plea to the second count: the plaintiff, admitting the facts stated in the plea, says that a former owner of the defendant's messuage gave the plaintiff leave to build the house. Several objections are made to this replication, the principal being that the former owner had no right to give such permission, to be exercised in alieno solo, and that the license, not being stated to be by deed, would be inoperative to bind the defendant, if even it would bind the party who gave it. The cases of *Winter v. Brockwell*, 8 East, 308, and *Harvey v. Reynolds*, 12 Price, 724, were relied upon on the part of the plaintiff. The latter case was most in point, as it was the case of one commoner giving license to another to make an encroachment upon the common, which license was pleaded to an action on the case for a disturbance of the plaintiff's right of common.

It is not necessary to consider what the effect of a parol license would be against the person granting it; \*for it is here pleaded against a subsequent owner in fee, as running with land and binding the inheritance. [\*778]

In *Winter v. Brockwell*, and *Harvey v. Reynolds*, the license was set up against the party who gave it; but we are not aware of any case in which it has been held that such a parol license would bind the inheritance and run with the land. On the contrary, it is laid down in *Shepard's Touchstone*, 231, that "license, or liberty, cannot be created and annexed to an estate of inheritance or freehold without deed." In *Monk v.*

*Butler*, Cro. Jac. 574, it was held that a license by a commoner must be by deed; and the same opinion was expressed by the court in *Hoskins v. Robins*, 2 Saund. 323, 328. The right claimed by the plaintiff in the present case as against the defendant is for freehold interest, if any, which could only pass by deed.

Upon this point the case of *Hewlins v. Shippam*, 5 B. & C. 221, is a leading authority, in which all the cases upon the subject are considered, and in which it was so decided.

We are therefore of opinion that the replication to the sixth plea to the last count is bad; and are therefore to consider whether that plea itself is good. It justifies the expelling, putting out and removing the plaintiff and his family from the house, and also the taking his goods and chattels out of it to a certain distance, by the same right of common, and avers that for that purpose the defendant pulled down the house, and in so doing necessarily and unavoidably expelled and put out the plaintiff; which justification is not good, according to what we have already said, if an actual expulsion of them \*by force at the time is intended.

\*779] The words "ejected," "expelled," "put out," and "removed" may be said to be satisfied, under some circumstances, by proof that the house was destroyed in their absence, and by their being prevented from returning to it and re-entering it because on attempting to do so they found that it existed no longer as a habitable house. But, in the present case, looking at the language of the plea itself, this would be a forced construction; and the natural meaning of the words is that the pulling down and expelling were contemporaneous. If so, the same arguments that have been held fatal to the first set of pleas will also prove this to be bad in law.

Judgment for plaintiff.

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### BODLEY against REYNOLDS. Tuesday, April 21st.

In trover, damages may be given in respect of special damage, besides the value of the goods converted, if special damage be laid in the declaration.

As where, in trover for carpenter's tools, special damage was laid in respect of the plaintiff, a carpenter, being hindered from working.

TROVER for goods and chattels, to wit, ten saws, ten planes, &c., (other carpenter's tools.) After alleging the conversion, the declaration proceeded as follows. "By means whereof the plaintiff was prevented from working at his trade of a carpenter for a long time, to wit, from thence hitherto, the said goods and chattels being the working tools and implements of trade of the plaintiff; and was and is, by means of the premises, greatly impoverished. To the plaintiff's damage of 100l.," &c.

Plea: Not guilty. Issue thereon.

On the trial, before Lord DENMAN, C. J., at the London sittings after last term, a verdict was found for the plaintiff. It appeared that the value



of the goods taken \*was 10*l.*: but some proof was given that the plaintiff had suffered hindrance in his work from want of the tools; and the Lord Chief Justice told the jury that they might, if they thought right, give damages also for the detaining. The jury found 20*l.* damages. [\*780]

In this term, (a)

*Allen*, Serjt., moved for a new trial, or that the damages might be reduced to 10*l.* The gist of the action is conversion: till that has taken place no damage is suffered: the measure therefore of the damages is the value of what is converted. That was laid down by POLLOCK, C. B., in a late case, at *Nisi Prius*. The language of TINDAL, C. J., in *Moon v. Raphael*, 2 New Ca. 310, points to the same doctrine. [PATTESON, J., referred to *Davis v. Oswell*, 7 C. & P. 804.]

Lord DENMAN, C. J. We will confer with the other judges.

*Cur. adv. vult.*

Lord DENMAN, C. J., on a subsequent day of the term, (April 21st,) delivered the judgment of the court.

In this case we think there should be no rule. The Lord Chief Baron, to whom we have spoken, says that he must have been misunderstood. Where special damage is laid and proved, there can be no reason for measuring the damages by the value of the chattel converted.

Rule refused.

(a) April 17th. Before Lord Denman, C. J., Patteson, Williams, and Wightman, J.

\*OLIVERSON and Another against BRIGHTMAN and Others. [\*781]  
*Friday, April 24th.*

THOMAS BOLD and Another against ROTHERAM.

Assumpsit on a policy of insurance on goods, at and from Liverpool to Lintin, Hong Kong, Macao, Canton, &c., or all or any other port or ports, place or places, in China, the East Indies, and the Indian or China seas, the Gulf of Siam or seas adjacent, particularly Manilla and Singapore, backwards and forwards, &c., *with leave to transship or reship* the goods on board the same or any other vessel or vessels, and from such other vessel, &c., to any other vessel, &c., at or off Singapore, Manilla, Macao, &c., or elsewhere in the Canton river, or on the coast of China, or in the China seas or Gulf of Siam, or seas adjacent, for Canton, Manilla, Singapore, or any other of the ports or places aforesaid, and with leave for the ship named, or any other vessel, &c., on board which the goods might have been transhipped, to proceed from any port, &c., in China, the China seas or seas adjacent, particularly the before-mentioned places, to any other ports or places in China, the East Indies, or the Indian or China seas or seas adjacent, and discharge the goods at any or all of the said places, or remain at the same until it should be deemed expedient to proceed to the port or place of discharge: continuing the risk by land and water until the goods should be arrived at their final port of destination, and including all risk of boats, &c., and of transshipment as above mentioned. Premium 5 guineas, to return 50*s.* per cent. if the vessel discharged at Manilla direct or at a port in China in the usual course, the port being open, or 60*s.* per cent. if she discharged at Singapore direct. The count alleged a loss by perils of the seas before the goods were landed at their final place of destination.

Plea. That the ship arrived at Hong Kong on the coast of China, and that, while she lay there, by reason that she could not safely proceed to any usual port or place of discharge

in China, it was agreed by the agents of the assured that the goods should be finally discharged at Hong Kong, and thereupon they were by the said agents discharged out of the said ship into another ship, being a receiving ship appointed by them as a warehouse for receiving and storing the said goods: that Hong Kong, then and before the alleged loss, became the final place of destination, and the goods, before such loss, were finally discharged and safely landed at such final place of destination.

Replication: That the goods were not, before the loss, discharged and safely landed at their final place of destination, in manner and form, &c. Issue thereon.

It appeared in evidence that the ship named (the Penang) sailed on the voyage insured, and met with a storm which damaged the ship and goods, not, however, rendering the ship unseaworthy. She arrived at Macao in June, 1841. There was no market for goods at Macao. Hostilities had taken place (but without formal declaration of war) between the Chinese and the English, who, in May, had stormed Canton. Before the Penang arrived, hostilities had been suspended; but peace was not finally established till August, 1842. The English naval commander on the Canton station did not prohibit British ships from going to Canton at their own risk; but the Chinese were so much exasperated against the English, that the consignees at Macao of the goods on board the Penang deemed it unsafe for her to go to Canton; and they chartered another ship for three months, to accompany the Penang to Hong Kong, (four miles from Macao,) in order that the goods might be transhipped and examined, and might be in a place of safety till they could be sent to Canton or some other market when circumstances should permit. Hong Kong was considered a safe place for this purpose; Macao not. There was no market at Hong Kong. The consignees did not intend either to reship the goods on board the Penang, or to make Hong Kong the final place of deposit for sale. The goods, after being transhipped, were lost on board the second ship by perils of the seas.

On a special case, empowering the court to draw such inferences as a jury might,

*Held:* That (assuming that question to arise on the pleadings) Canton was not such a hostile port as, in point of law, could not be considered a possible place of final destination: that, at the time of the transshipment, other places, in China and elsewhere, might have become the place of final destination within the intention of the policy: and that the plea, stating Hong Kong to have become, before the loss, the final place of destination, was not borne out.

In assumpsit on another policy upon goods by the Penang, lost at the same time by the same perils, the policy reserving no liberty to transship, but in other respects (so far as is material here) resembling the former, the defendants pleaded that, after the sailing, &c., the goods were, by the agents of the assured, without any cause rendering it necessary, and without defendant's consent, removed from on board the Penang, and placed on board another ship, and were continued there till the loss happened. On replication *De injuriâ*, and special case setting forth the facts above stated, with liberty to the court to draw such inferences as a jury might,

*Held*, that the facts showed a departure from the voyage insured against, and that the plaintiffs could not recover.

THESE were special cases for the opinion of the court. In

OLIVERSON v. BRIGHTMAN,

the case was stated as follows.(a)

This action was brought on a policy of insurance effected, by and in the names of the plaintiffs as agents, \*on 31st October, 1840, for  
\*782] the benefit of Garnett and Horsfall, cotton manufacturers at Clithero, on goods on board the ship Penang from Liverpool to China. The policy was effected with the General Maritime Insurance Company in London, and was subscribed by the defendants as three of the directors.

The declaration set out the policy, which was in the printed form used by the company: and the following were the terms of the risk insured.

The voyage was at and from Liverpool to Lintin, <sup>&</sup> — Hong Kong, <sup>&</sup> —  
or or

(a) A few particulars not material to the report are omitted.

Tongkoo,  $\frac{\&}{\text{or}}$  Macao,  $\frac{\&}{\text{or}}$  Wampoa,  $\frac{\&}{\text{or}}$  Canton, or all or any other port or

ports, place or places, in China, the East Indies, and the Indian and China seas, the Gulf of Siam or seas adjacent, particularly Manilla and Singapore, backwards and forwards twice or oftener in any rotation, with leave

to transship  $\frac{\&}{\text{or}}$  \*reship the interest insured by the said policy on [\*783

board the same or any other vessel or vessels of any flag, and from such other vessel or vessels to any other vessel or vessels, at or off Singapore, Manilla, Macao, Lintin, Wampoa, or elsewhere in the Canton river, or on the coast of China, or in the China seas, or the Gulf of Siam or seas adjacent, all or any, for Canton, Manilla, Singapore, or any other of the ports or places aforesaid, and with leave for the ship named in the said policy, or any other vessel or vessels on board of which the interest might have been transshipped as above mentioned, to proceed from any port or ports, place or places in China, the China seas or seas adjacent, particularly the before-mentioned places, to any other ports or places in China, the East Indies, or the Indian or China seas or seas adjacent, and discharge the goods at any or all of the said places, or remain at the same until it should be deemed expedient to proceed to the port or place of discharge; and with leave to call, touch, stay and trade, discharge, take in (a) exchange goods, freight, specie and passengers at all or any ports, parts and places, customary or not customary, on this side, at, and beyond, the Cape of Good Hope; and continuing the risk by land  $\frac{\&}{\text{or}}$  by water until the

goods should be arrived at their final port of destination; and including all risk of boats and craft and of transshipment from vessel to vessel as above mentioned, including the risk of craft to and from the vessel. The subject insured was stated to be 50 bales, and 100 trusses in 25 bales; goods valued at 5100*l*. The premium in the policy was 5 guineas per cent., to return 50*s*. per cent. \*if the vessel discharged at Manilla direct or at a port in China in the usual course, the port being [\*784 open, or 60*s*. per cent. if she discharged at Singapore direct.

The declaration further alleged that the General Maritime Insurance Company became insurers for 4000*l*. That the vessel with the goods insured on board set sail from Liverpool on 1st November, 1840, towards China, and, on 27th June, 1841, arrived at or near Hong Kong on the coast of China; and that, afterwards and before the goods were landed at their final place of destination, and during the continuance of the risk in the policy, the goods were by the perils of the sea totally lost, and never were safely landed at their final place of destination. The declaration also contained counts for money had and received, and upon an account stated. The defendants pleaded:

(a) So in the declaration.

1. To the 1st count. That the goods were not by the perils of the sea lost to the plaintiffs, in manner and form, &c.

2. To the 1st count. That, after the ship sailed from Liverpool on the said voyage, to wit, on 22d June, 1841, the said ship with the said goods and merchandise on board thereof safely arrived at a certain place on the coast of China, to wit at Hong Kong, and that, whilst the said vessel was lying at Hong Kong aforesaid, and before the said alleged loss of the said goods, &c., to wit, on the day and year last aforesaid, by reason that the said ship could not safely proceed to any usual port or place of discharge in China, it was agreed and determined by the agents of the assured that the goods, &c., should be finally discharged at Hong Kong aforesaid; and thereupon afterwards, to wit, on, &c., at Hong Kong aforesaid, the \*785] said goods, &c., were \*by the said agents of the assured discharged out of the said ship called the Penang, into and on board a certain other ship there, to wit, the James Laing, the said last-mentioned vessel then being a receiving ship of the said agents of the assured, appointed and then used by them as and for a warehouse for receiving and storing the said goods, &c.; and the said goods, &c., were then, and before the said loss, safely discharged into and received on board the said last-mentioned ship or vessel as such warehouse of the said goods, &c. That the said place called Hong Kong then and before the said alleged loss became and was the final place of destination of the said ship called the Penang, and of the said goods, &c., in the first count mentioned, and the said goods, &c., then and before the said alleged loss were finally discharged and safely landed at their final place of destination, to wit, in the manner aforesaid, at Hong Kong aforesaid.

3. To the 1st count. That the said ship, in the prosecution of the said voyage, arrived at Hong Kong on the coast of China; and afterwards, and before the said alleged loss, and during the continuance of the said risk, to wit, on 1st July, 1841, the said goods, &c., in the said policy of insurance and in the said first count mentioned, were by the agents of the assured transshipped from the said ship called the Penang to and on board of a certain other ship there, to wit, at Hong Kong aforesaid, then lying and being, called the James Laing; and that the said goods and merchandise were lost to the said plaintiffs after the said transshipment and whilst the said goods and merchandise were so on board the said last-mentioned ship or vessel: and that, at the time when the said goods and \*786] merchandise were \*received and taken on board the said last-mentioned ship, to wit, on the day and year last aforesaid, and from thence continually to the time of the said loss, the said last-mentioned ship or vessel was unseaworthy.

And, as to the last two counts, Non assumpsit.

The plaintiffs joined issue upon the 1st and last pleas. To the 2d plea they replied; That the goods insured were not before the loss discharged and safely landed at their final place of destination, in manner and form,

&c. To the 3d plea: That the ship *James Laing* was not unseaworthy, in manner and form, &c.

The action was tried at the Spring assizes, 1844, at Liverpool, before ROLFE, B., when a verdict was found for the plaintiffs for 2879*l.* 1*s.* 10*d.*, subject to the opinion of the court on the following case.

The ship *Penang* sailed from Liverpool for China with a cargo on board of the value of between 80,000*l.* and 90,000*l.*, consisting of British manufactured cotton and woollen goods, including the goods described in the policy, belonging to Messrs. Garnett and Horsfall and of the value mentioned in the policy. The *Penang* set sail from Liverpool on the 1st November, 1840. She encountered some bad weather in the Bay of Biscay, but did not sustain any material damage; nor did any thing material occur in the voyage until her arrival off the Cape of Good Hope; but, when a little to the eastward of the cape, she met with a violent hurricane which threw her upon her beam ends, and her main and mizen masts were carried away and the ship dismasted, and the maintop-sail-yard fell upon the deck, and stove in part of the deck for the breadth of three planks, by which a large quantity of water was let into the hold of the vessel, whereby the cargo sustained much damage. The [\*787 captain and crew, as soon as they could do so, cut away the wreck of the masts and rigging. The ship then righted: and they then set about securing the hole made in the deck, and rigging the ship with jury masts, which they succeeded in effecting, and then made the best of their way for the port of Singapore, which lies nearly in the direct route to China. The ship arrived at Singapore on the 13th April, 1841; and the captain then ascertained that he could get the ship remasted and fit to proceed to China within a month. The vessel was accordingly remasted and refitted, but did not get away from Singapore until the 8th June, 1841, when she sailed for China. She arrived in Macao Roads on the 22d of June, 1841. On the arrival of the ship at Macao, Mr. Burn, the managing partner in the firm of M<sup>r</sup> Vicar and Co., the consignees of the cargo, did not, under the circumstances which then existed, and which are detailed in his evidence afterwards referred to, deem it fit to send the ship up the river to Canton.

Under the circumstances stated in the evidence of Mr. Burn hereinafter set forth, the *James Laing* was chartered by Mr. Burn. A copy of the charter of the *James Laing* was proved by Mr. Burn, and is hereinafter set forth, the original charter having been lost in the wreck of the *James Laing* hereinafter mentioned. The *Penang* and the *James Laing* sailed for the harbour of Hong Kong in order to the transshipment of the goods from the *Penang* into the *James Laing* taking place there.

The two vessels sailed for Hong Kong on the 26th June, 1841, and arrived there on 28th June, 1841. Whilst the cargo was in progress of transshipment, a severe typhoon came on, by which the *James Laing* was

porary purpose. Receiving ships have an establishment of clerks. They are for purposes of trade, chiefly in opium and other smuggled goods. The James Laing was hired to be used as a receiving ship at Hong Kong till we could prepare at that place a temporary or permanent warehouse, as might be most expedient, or until we could send them to Canton or any other market in China. It was then quite uncertain when Canton or any market in China might be open. In fact, Canton was open soon afterwards. When the goods were put on board the James Laing, I do not think there was any intention of bringing them back to the Penang. Probably, when the goods were removed to the James Laing, we contemplated sending the Penang as soon as possible back to England. About the time of the typhoon, we had engaged for the Penang to take 300 tons of tea back to England. The 630 chests would be about 50 tons: they formed no part of the 300. The typhoon was the 21st July. On the 20th July, the Penang was advertised as having a considerable part of her cargo on board; but that was a mistake. The 630 chests eventually became part of the cargo; but that was not arranged at the time of the typhoon. Before the Penang arrived in June, it was contemplated that, if we could arrange for a cargo for her, we would tranship her cargo to the Amazon, and send her back to England \*without much delay.

\*792] The goods put on board the James Laing from the Greyhound and Fatima were not a large quantity. They were lost.

*Re-examined.*—In the uncertain state of affairs our intention varied. At one time we thought of sending the Penang to Sydney, with a cargo from China. We never resolved not to send her on to Canton, if circumstances had allowed. Hong Kong was at that time the only safe port. It was a harbour; no establishment on shore. At one time we thought of sending the 300 chests by the Hope. She was a vessel consigned to us. The 300 tons were intended for the Penang. I speak of the James Laing as a receiving ship, not in the technical sense of a receiving ship, but merely as a ship in which it was temporarily to be received. The damaged goods sold at Hong Kong were sold by auction, not in the usual course of trade. The sale was advertised at Macao and Canton. It was a sale of whatever was saved from the James Laing. It was managed by Lloyd's agents: we had nothing to do with it. Sir H. Pottinger arrived on the 10th of August, 1841: we had then truce with the Canton provinces, and war with the rest of China. Many vessels went up to Canton at the end of 1841. We never contemplated Hong Kong as the final place of deposit of the goods for sale. There is no market there. Wherever they were to go for sale they must go further.

#### Examination of Joseph Nias.

In November, 1840, I went out to China in command of the Herald, a queen's ship, 28 guns. I was in all the operations in the Canton river. I was senior officer when Sir William Parker came out in 1841, (August.) I remember the typhoon. There was no declaration of war by the English against the Chinese. I could not prevent British ships going up to Canton, if they thought fit. They went at their own risk, if they thought fit. Hong Kong is the best anchorage in those seas; much preferable to Macao. There was great exasperation against the English at the time of the typhoon. The taking of Canton was the 24th May. They agreed to pay 6,000,000 of dollars. There was a suspension of hostilities. The vessels of war left the Canton river about two months after; in August, or September, or October. I returned there.

The seaworthiness of the James Laing was not disputed at the trial.

The court was to be at liberty to draw any inference of fact from the evidence which a jury might draw. The question for the opinion of the court was, Whether or not the plaintiffs are, under the circumstances, \*793] entitled to recover? If the court should be of opinion \*that they were, the verdict was to stand; if of a contrary opinion, a nonsuit to be entered.

*Martin*, for the plaintiffs. The plaintiffs are entitled to a verdict on the issue on the second plea. Hong Kong was not, within the meaning of the policy, the final place of destination. The final place of destination was the market to which it was intended to take the goods. There was nothing, beyond inconvenience and a certain degree of risk, to prevent the goods, after the transshipment into the James Laing, being sent on to Canton; there was no war between the Chinese and English, but only a feeling of ill-will



and suspicion shown by occasional acts of violence. The harbour of Hong Kong, and the ship *James Laing*, constituted merely intermediate stages in the voyage: there was not even a town at Hong Kong. *Brown v. Vigne*, 12 East, 283, was cited at the trial. There the policy was until arrival at the last port of discharge in the river Plate, the intended place of discharge was Buenos Ayres; but the ship arrived at Monte Video, which lies in the course to Buenos Ayres, and there commenced discharging, the master having learned that Buenos Ayres was in the hands of the Spaniards, with whom the English were formally at war; and he never went on to Buenos Ayres. Under these circumstances, it was held that Monte Video became the final port of discharge. The ground of the decision was that the ship could not legally go on to Buenos Ayres, there being a formal war; but here that fact does not exist. Canton, in strictness, was not other than a friendly port. The obstruction was treated as temporary: the *James Laing* was hired for a limited period accordingly. In *Tierney v. Etherington*, [794 (cited in *Pelly v. Royal Exchange Assurance Company*, 1 Burr. 341, 343, 345, 348,) it was held that goods placed in a store-ship lying in one of the ports named in the policy, where the goods might, by the policy, be unloaded and reshipped in a British ship, were covered by the insurance; it appearing that there was no British ship there, and that, in such case, the custom of the port was to put the goods on board a store-ship. The policy here provides for transshipping, and that is all that has been done. If it proved impossible to reach Canton, there is nothing to show that another port mentioned in the policy might not be adopted as the place of final discharge. By the provision, as to return of premium, this appears to have been contemplated.

Sir *F. Kelly*, Solicitor-General, contra. The transshipment provided for was only a transshipment with a view to an ulterior voyage; here the voyage to Canton had become impossible, there being open war. A war de facto must affect an insurance exactly as a war declared. The goods, therefore, had reached their final destination when they were on board the *James Laing*, within the authority of *Brown v. Vigne*, 12 East, 283. That ship was not hired for any voyage: she was, in effect, a warehouse; and the goods were stored in her until the agents could determine what was the best mode of disposing of them. If they had been forwarded to a Chinese port, they would have been seized and the underwriters discharged. [PATTERSON, J. In *Brown v. Vigne*, the master intended to discharge at Monte Video, if the market should be favourable.] [795 That does not distinguish the case from the present, since here the goods had been carried as far as possible. Lord ELLENBOROUGH's words apply: "the port of destination was in a state of open hostility at the time, which cannot be considered as a mere temporary obstruction." *Brown v. Vigne* is cited in 1 Phillips on Insurance, ch. xi. § 2, 468, 469, (2d ed., London, 1840;) and the author afterwards

(p. 470) says: "The risk ends when the voyage is intercepted and broken up by a peril not insured against. Insurance was made 'from New York to Bordeaux, free from loss or detention, in consequence of prohibited trade.' The vessel was prohibited to enter at Bordeaux. Chief Justice KENT said, 'The prohibition to enter, under the special provision in the policy, was equivalent to an actual termination of the risk by landing the goods.' " (Citing *Speyer v. New-York Insurance Company*, 3 Johnson's Rep. Sup. C. &c., 88, 94.) It is manifest that, if the master continue his intention of entering a hostile port, waiting only till the hostility shall cease, that is not a temporary, but a permanent obstruction; otherwise the suspension might last for many years.

*Martin* in reply. The illegality, if there was any, of proceeding to Canton raises no defence under the second plea: the question is whether the policy was determined. [PATTESON, J. Why is it considered impossible to go into an enemy's port?] Because the trading with an enemy is illegal. Here it might have been imprudent to go to Canton, but was \*796] not illegal. [PATTESON, J. It would seem then that the case is hardly within \*the alleged principle, unless an English commander would have been justified in stopping the ship from going to Canton.] That is so. *Evans v. Hutton*, 4 Man. & G. 954, shows that, if an English commander had prevented the ship from going to Canton, when her majesty's government had not commenced war, his act would not have been recognised in a court of law. There, to a declaration in assumpsit against a shipowner for not delivering plaintiff's goods at Canton according to contract, the defendants pleaded that they were prevented by certain officers of the queen duly authorized in that behalf, and exercising the powers of her majesty's government on the high seas near Canton, to wit, the superintendent of the trade of her majesty's subjects with China, and the commander of her majesty's naval forces there; and the plea, on demurrer, was held insufficient, TINDAL, C. J., observing: "The plea does not state that the prohibition was in exercise of the acknowledged prerogative of the crown, of the right of declaring peace and war; nor does the case fall within the range of those which might be cited, in which the dissolution of the contract is shown, by showing that it is to carry goods to a party, who, by declaration of war, is made an enemy." 6 Jurist, 1043. If the goods, here, had been put into a warehouse at Hong Kong to await an opportunity of safe transport to Canton, the case would have been the same as it now is; the risk would have continued. [PATTESON, J. It does not appear that the *James Laing* was not a carrying-ship.] It does not. But the only question raised by the pleadings is whether or not the goods, before the loss, \*797] were discharged and safely landed at their place of final \*destination. The policy does not limit the assured to one transshipment. Its terms evidently show that it was framed in contemplation of the state of things existing in China. As to *Brown v. Vigne*, 12 East,

283: Buenos Ayres was a place with which the British government was actually at war: the case, therefore, stood as if that place had been struck out of the policy; a notion of the master that he might still go there could not make it an open market. The rule stated in 1 Phillips on Insurance, 470, that "the risk ends when the voyage is intercepted and broken up, by a peril not insured against," does not apply here, for the voyage was not "intercepted."

The court desired to hear the argument in *Bold v. Rotheram* before giving judgment in this case. In

### BOLD v. ROTHERAM

the case was stated as follows.(a)

This action was brought on a policy of insurance effected by and in the names of the plaintiffs on 30th October, 1840, for the benefit of themselves and of James Bold, merchants and ship-owners in Liverpool, on goods on board the ship *Penang* from Liverpool to China. The policy was subscribed by the defendant for 200*l.*: a copy was annexed to the case, and to be taken as part of it.(b)

"The declaration, after setting out the policy, alleged that the defendant became an insurer for 200*l.* That the vessel, with the goods insured on board, set sail from Liverpool on 1st November, 1840, towards China, and on 27th June, 1841, arrived at or near Hong Kong on the coast of China; and that afterwards, and before the goods were landed at their final place of destination, and during the continuance of the risk in the policy, the goods were by the perils of the sea totally lost, and never were safely landed at their final place of destination. The declaration also contained a count for money had and received, and on an account stated. [\*798]

(a) A few particulars not material to this report are omitted.

(b) The policy, dated 30th October, 1840, was "at and from Liverpool to any port or ports, place or places, in the Canton river or on the coast of China or islands adjacent, inclusive of Manila, with liberty to wait at any port or place until the intended port or place of discharge can be entered: upon any kinds of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the *Penang*, whereof is master, under God, for this present voyage, Cumming, or whosoever else," &c.: "beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship at Liverpool, upon the said ship, &c., including the risk of craft; and so shall continue and endure, during her abode there upon the said ship, &c.: and further until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever shall be arrived at her final port or place of discharge, upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be there discharged and safely landed. And it shall be lawful for the said ship, &c., in this voyage, to proceed and sail to, and touch and stay at any ports or places whatsoever, with leave to call at or off any port or place in any order backwards and forwards for all purposes of trade, information, or otherwise, without prejudice to this insurance. The said ship, &c., goods," &c., "for so much as concerns the assured," &c., (valuation of goods, described in the margin by numbers, &c., at 4000*l.*) "Touching the adventures and perils," &c., (the usual clauses.) And the assurers confessed themselves paid the consideration due to them for this assurance by the assured "at and after the rate of 4*l.* per cent., to return 30 per cent. for discharging in Canton river within one month after arrival. In witness whereof," &c.

\*799]      \*The defendant pleaded :

1. Except as to 3<sup>l</sup>. in the second count mentioned, Non assumpsit.

2. To the 1st count. That the plaintiffs and the said James Bold were not interested in the goods.

3. To the 1st count. That, after the said ship, with the said goods on board thereof, arrived at Hong Kong aforesaid, as in the 1st count mentioned, and before the said supposed loss, to wit, on 22d June, 1841, the said goods were there, to wit, at Hong Kong aforesaid, by the agents of the assured in that behalf, finally discharged from and out of the said ship in the said policy and declaration mentioned, into and on board of a certain other ship then lying and being in the river there, to wit, at Hong Kong aforesaid, the warehouse of the said goods for the assured, the said last-mentioned vessel there being used by the said agents of the assured as a warehouse for receiving and storing the said goods : and that Hong Kong aforesaid, then being a port or place on the coast of China, and made and becoming the final port and place of destination of the said goods, and the said goods being there discharged in safety, to wit, in the manner aforesaid, the said voyage and risk in the said policy mentioned, thereby, then and before the said supposed loss of the said goods, or any of them, to wit, on the day and year last aforesaid, were wholly ended and determined : without this, that the said goods or any of them were lost during the continuance of the risk in the said policy mentioned, in manner and form, &c.

4. To the 1st count. That, after the sailing of the said ship on the said voyage, and after the arrival thereof with the said goods on board \*800] at Hong Kong aforesaid, and before the said supposed loss of the said goods or any part thereof, to wit, on 22d June, 1841, the said goods were by the agents of the assured there, to wit, at Hong Kong aforesaid, without the knowledge or consent of the defendant, and without any stress of weather or other cause rendering the same necessary, removed and taken out of and from on board of the said ship in the said policy and declaration mentioned, and put and placed in and on board of a certain other ship there, and were and continued in and on board of said last-mentioned vessel until and at the time of the said loss thereof as in the said first count mentioned.

5. To the 1st count. That, after the said ship in the said policy and declaration mentioned in the prosecution of the said voyage at Hong Kong aforesaid, (sic) on and before the said supposed loss and during the continuance of the said risk, to wit, on 22d June, 1841, the said goods were by the agents of the assured transshipped and removed from and out of the said ship in the said policy and declaration mentioned to, into and on board of a certain other ship there, to wit, at Hong Kong aforesaid, then lying, and that the said goods were lost to the plaintiffs after the said transshipment and removal, and whilst the said goods were

so on board of the said last-mentioned ship. And that, at the time when the said goods were received and taken on board of the said last-mentioned ship, the said last-mentioned ship was unseaworthy.

6. As to the 2d count, payment of 3*l.* into court.

The plaintiffs joined issue upon the 1st, 2d, and 3d \*pleas. To the 4th and 5th pleas they replied *De injuriâ*: and, as to the last plea, they took out of court the 3*l.* in satisfaction, &c. [\*801]

The action was tried at the Spring assizes, 1844, at Liverpool, before ROLFE, B., when a verdict was found for the plaintiffs for 165*l.* 3*s.* 4*d.* (after giving credit for the 3*l.* paid into court,) subject to the opinion of this court on the following case.

The ship *Penang* sailed from Liverpool for China, with a cargo on board of the value of between 80 and 90,000*l.*, consisting of 1550 bales of British manufactured cotton and woollen goods, including the goods described in the policy, belonging to the plaintiffs and the said James Bold, and of the value mentioned in the policy.

The *Penang* set sail from Liverpool on the 1st November, 1840. (The statements were then precisely the same as in *Oliverson v. Brightman*, pp. 786, 787, *antè*, down to the arrival in Macao roads on 22d June, 1841.)

The *Penang* and her entire cargo, except a very small portion, was consigned to the house of M·Vicar & Co. The plaintiffs sent a copy of the policy to them. The bill of lading of the goods insured was as follows:

“Shipped in good order and condition, by George Armstrong, of Liverpool, in and upon the good ship or vessel called the *Penang*, whereof Cumming is master for the present voyage, and now lying in the port of Liverpool, and bound for Macao, 43 bales, 1 case, merchandise, being marked and numbered as per margin,<sup>(a)</sup> and are to be delivered in the like good order and condition at \*the aforesaid port of Macao, all and every the dangers and accidents of the seas and navigation of whatever nature or kind excepted, unto Messrs. M·Vicar & Co. there, or to their assigns paying freight for the said goods here, at the rate of 80*s.* for bales and cases per ton of forty cubic feet, and 5 per cent. primage, with average accustomed. In witness whereof the master or purser of the said ship or vessel has affirmed to four bills of lading,” &c. [\*802]  
 “Dated in Liverpool, this 29th of October, 1840. Contents unknown.”

The case then stated, as in *Oliverson v. Brightman*, p. 787, *antè*, that Burn did not think fit to send the ship to Canton, and the subsequent facts, down to the loss caused by the typhoon at Hong Kong during transshipment.

The whole of the goods insured by the policy had been transshipped on board the *James Laing*, except four bales. The following receipt for the goods transshipped from the *Penang* was endorsed on the bill of lading, and signed by the master of the *James Laing*. “Received on

(a) The marginal statement of numbers, &c. was added in the case, but is not material here

board the James Laing the within mentioned goods, with the following exceptions, viz.:" &c. (four bales of long cloth.) "Hong Kong, July, 1841. (Signed) Thomas Pritchard, Commander."

The Penang assisted in endeavouring to save some part of the cargo of the James Laing, and remained at Hong Kong until 25th October, when she sailed, &c., as stated in the evidence after mentioned.

The case then ascertained the defendant's proportion of the loss, and the amount at which, subject to the case, the verdict was to be entered. The evidence of Burn and Nias, and the depositions of Cumming and \*803] Pritchard, (referred to in *Oliverson v. Brightman*,) were \*to be taken as part of this case also. The pleadings, and a copy of the policy, were likewise to be deemed part of the case. The interest of the plaintiffs and James Bold, and the seaworthiness of the James Laing, were admitted.

The court was to be at liberty to draw any inferences of fact from the evidence, which a jury might draw. The question for the opinion of the court was stated precisely as in *Oliverson v. Brightman*, ante, p. 792.

*Martin* for the plaintiffs. The terms of the policy in this case are not the same as in the last, there being no express reservation of a power to transship, and for vessels on board of which the interest might be transhipped to proceed from port to port, &c. But the policy protects to the final port or place of discharge, and is evidently made in contemplation of the state of affairs in China, reserving "liberty to wait at any port or place, until the intended port or place of discharge can be entered." Then, as to the 3d plea: Hong Kong was not made, as is there alleged, the final place of discharge or port of destination. The argument on this point is the same as in the former case. But if it be further contended, that the transshipment from the Penang into the James Laing at Hong Kong, was a deviation from the voyage contemplated by the policy, and so the underwriters were discharged, the answer is that, on the evidence, the transshipment was clearly necessary, and was not resorted to, with the intention of making Hong Kong the place of final discharge. If the transshipment was necessarily and bona fide undertaken for the security of the goods, it was done justifiably, and does not discharge the under- \*804] writers. As \*GIBBS, C. J., said in *D'Aguilar v. Tobin*, Holt, N. P. C. 185, 186: "Whatever is necessary for the safety of the ship," (and the same applies to goods,) "provided it be not excluded by the terms of the policy, may be done by the captain; and what is so done, is done as agent to the underwriters. A vessel, when insured, may always do whatever it would be expedient to do if uninsured. She may deviate somewhat from the straight line of her track to seek convoy, when it is for the common good and preservation." In *Pelly v. Royal Exchange Assurance Company*, 1 Burr. 341, this court recognised the principle, that things which are necessary for the ordinary purpose of the voyage, and agreeable to the course of practice in similar voyages, may be done with-



out prejudice to the insurance; and accordingly it was held that sails and rigging put into a warehouse on shore, to be kept while the ship should be cleaned and refitted, being there lost, were lost during the voyage insured. The removal being *ex justâ causâ*, the articles were protected by the insurance as if they had remained in the ship. Here, if it had been expressly shown that the goods were put into the *James Laing* with the intention of reloading them on board the *Penang*, the plaintiffs would clearly be entitled to recover. But, at least, no contrary intention appears; and, even if there was such an intention, it would not, until carried into effect by an actual deviation, vitiate the policy; *Hare v. Travis*, 7 B. & C. 14; 2 Park, Ins. 654, chap. 17, (8th edit.) While the cargo was under examination, it could not be said that the risk was altered. [PATTESON, J. Burn says in his \*cross-examination: “The *Penang* was advertised for England, about July: I think it was con- [\*805 templated to send the *Penang* back to England, as soon as we resolved to transship the cargo.”] If that project was entertained, still the owners had done nothing which obliged them to act upon it. And further, on the 3d plea in this case, as well as on the 2d plea in *Oliverson v. Brightman*, it lies on the defendants to show affirmatively that Hong Kong was made the final port of destination; but the evidence clearly does not come up to that point. As to the issue on the 4th plea and replication *De injuriâ*, the only conclusion that can be drawn from the evidence is that the transshipment and detention of the goods on board the *James Laing* were unavoidable.

*Crompton*, *contra*, was stopped by the court.

LORD DENMAN, C. J. I am quite convinced on both cases.

As to *Oliverson v. Brightman*: even if the Solicitor-General is right as to the state of affairs at Canton, and the evidence proves the case relied on by him in that respect, the case does not bear out the material issue on the part of the defendants. The terms of the policy were calculated for a particular state of things, and the uncertainty which existed, whether or not we should be at war with China. But there is no pretence for saying that, when the facts stated in the case occurred, England had placed herself in a state of war with that country. The parties might provide for the contingency which actually happened, by stipulating that the vessel, or any other into which the cargo might have been transhipped, might proceed to all or any of the \*places named, and discharge [\*806 there, “or remain at the same until it should be deemed expedient to proceed to the port or place of discharge;” that is, till the state of things had ceased which rendered it inexpedient to discharge at such place. But the provisions are so unlimited in their nature that they apply as much to Singapore, as to places in China: and they contemplate a trading, not with a country which should have become our enemy, but with a power still at peace with us. In this case, therefore, the plaintiffs are entitled to recover.

In *Bold v. Rotheram*, the acts done are so unambiguous, and so clearly denote an intention to do what the policy did not warrant, that we must hold the transshipment to have been a departure from the due course of the voyage insured: and our judgment must be for a nonsuit.

PATTESON, J. The first case turns entirely on the question, raised by the second plea, whether or not Hong Kong had become the ship's place of final destination before the loss. I think it had not. The policy was very general in its terms. It gave liberty to transship the goods at or off Singapore, Manilla, Macao, &c., or elsewhere in the Canton river, or on the coast of China, or in the China seas or Gulf of Siam, or in the seas adjacent, for Canton, Manilla, Singapore or any other of the ports or places aforesaid, with leave either for the original ship, or for any other into which transshipment should have been made, to proceed from any ports or places in China, the China seas, or seas adjacent, particularly the places before-mentioned, to any other ports or places in China, the East Indies, \*or the Indian or China seas or seas adjacent, "and  
 \*807] discharge the goods at any or all of the said places, or remain at the same until it should be deemed expedient to proceed to the port or place of discharge." As to Hong Kong being such a port of discharge, it clearly was not, on the construction of the policy itself. There was no market at Hong Kong; and it appears from all the evidence that the parties did not mean it to be the ultimate port. Burn says expressly, that the object in transferring the goods to the *James Laing* was, first to examine them, and secondly, to have them in a place of safety, till they could be sent to Canton or any other market where they could be sold. The Solicitor-General argues that going to Canton would have been illegal under the circumstances, and that *Browne v. Vigne*, 12 East, 283, governs this case. But I think otherwise. It appears on the evidence, that Capt. Nias had no power to prevent any English ship from going up to Canton: a person taking a ship thither would have run the risk, not of offending against the law of England, but of committing an imprudence, and perhaps exposing the ship to confiscation. There had been hostile operations; Canton had been stormed; but hostilities had afterwards been suspended by convention, and not renewed: it might be dangerous and unadvisable to go up the Canton river, because of the disposition of the Chinese; but there was no prohibition. The case, therefore, is not like *Browne v. Vigne*, where the port was possessed by an enemy, the Spaniards, and to enter it might have been assisting them. Here, the going up to Canton would not have been assisting an enemy.  
 \*808] \*If the vessel had gone up, and been wrecked, the underwriters would have been liable. There was, then, no actual intention to make Hong Kong the ultimate port of destination, and nothing in law which required it. On the mere question of fact, the evidence is all one way. I do not think it appears (though there may be a doubt upon it) that any distinct intention was entertained to make Canton, exclusively,

the ultimate port. I do not see why the goods might not have been sent to Singapore, or any of the other ports named in the policy. In the provisions there made, the very circumstance which occurred seems to have been contemplated. I was at first struck with the observation, that the *James Laing* was not a carrying ship, but a mere place of deposit: but, assuming that to have been so, I do not know that the goods, when in such a place, would not still have been protected by the policy; and, secondly, I do not see that this question on the character of the ship is raised by the pleadings.

As to the second case: the policy there contains no clause authorizing transshipment. We must take the evidence of *Burn* altogether: and by that it appears that before the *Penang* reached Hong Kong it was in contemplation to transship the cargo and send her back to England. The injury to the vessel was not such as prevented her being seaworthy: but there was reason to suppose that the goods were damaged. If the real intention was to transship for the purpose of ascertaining the extent of this damage, there might be weight in the argument that the purpose of the voyage insured was not so departed from that there might not still be a *locus pœnitentiæ*. But I think the primary object was not that suggested, and that the intention was to take \*the cargo from the *Penang* [\*809 entirely. Indeed *Burn* admits that it was never in contemplation to return the cargo into the *Penang*. Then the goods were, as the 4th plea avers, removed, without any cause rendering it necessary, from the ship in the policy and declaration mentioned into another ship, and were continued there until the loss. The 3d plea does not meet the case: but if the 4th does, that is sufficient for a nonsuit.

**WILLIAMS, J.** I am of the same opinion. As to the first case: the state of affairs between this country and China when the policy was effected was a very undesirable one; and the policy seems to have been framed with reference to it. The very description of the risk indicates that no precise port of discharge was contemplated; and there is much weight in the observation upon the clause as to return of premium. Nothing prevents a recovery by the plaintiffs in this case, unless transshipment was in itself a termination of the voyage, or unless there was a termination by reason of war with China. As to the latter question, supposing it to be open on the pleadings, it does not appear that a war was existing. *Bellum justum* ought, indeed, to be prefaced by a proclamation, though sometimes people are so much in earnest that they do not wait for it: but here the evidence did not show that there was in fact any war. As to the former point, the very terms of the policy give an answer. Twice over, liberty is reserved to transship: why was that introduced if it is now to be argued that when once the parties were rid of the original ship the risk was at an end? I think, then, that the plaintiffs in this case are entitled to recover, as the risk was not to Hong Kong, and was not in fact \*terminated there. In the second case, the omission [\*810

of liberty to transship makes an essential difference, as my Lord and my brother PATTESON have shown, and there must therefore be a nonsuit.(a)

In *Oliverson v. Brightman*: Verdict for the plaintiffs to stand.

In *Bold v. Rotheram*: Nonsuit to be entered.

(a) Coleridge, J., was absent on account of ill health.

### SANDERS against the Guardians of The ST. NEOT'S Union.

*Saturday, April 25th.*

If work be done for a corporation, for purposes connected with the corporation, under a verbal order, and accepted and adopted by them, they cannot, in an action to recover the price, object that no order was given under seal.

ASSUMPSIT for work and labour and goods sold and delivered, and on an account stated.

Plea: Non assumpsit. Issue thereon.

On the trial, before PARKE, B., at the last Bedfordshire Assizes, it appeared that the plaintiff had supplied the defendants with iron gates for the workhouse of the union, which gates had been completed, and erected at the workhouse: but, as the jury found, the only order given by the defendants was a verbal order to one of their own officers, since deceased, who had given the order to the plaintiff. It was objected that, as the defendants were a corporation, they could be liable only upon an order given by them under seal; and that therefore no legal order was proved, unless as against the deceased officer in his own person. The learned baron overruled the objection; and a verdict was found for the plaintiff. In this

\*811] term.(a)

\*Gunning moved for a new trial, on the above objection.

*Cur. adv. vult.*

LORD DENMAN, C. J., now delivered the judgment of the court.

A motion in this case was made for a new trial, on the ground that no contract under seal was proved against the defendants. But we think that they could not be permitted to take the objection, inasmuch as the work in question, after it was done and completed, was adopted by them for purposes connected with the corporation.

Rule refused.(b)

(a) April 17th. Before Lord Denman, C. J., Patteson, Williams, and Wightman. Js

(b) See the cases collected in *Paine v. Strand Union* ante, p. 326.

LAYTON against HURRY. *Monday, April 27th.*

Under stat. 5 & 6 W. 4, c. 59, s. 4, requiring the distrainer of any horse (which word "horse" may, by sect. 21, be construed as "horses") to feed it while in the pound, and empowering him, after seven days, to sell any such horse for the expenses, a party distraining several horses may sell one or more for the expenses of all. *Semble*, per Coleridge, J., that he may repeat such sale from time to time as need requires.

But, if he pleads the sale in an action of trespass for taking and converting the horses sold, he must allege that it was necessary to sell them for payment of the expenses.

And, where defendant had obtained a verdict on such plea not containing the above allegation, judgment was given non obstante veredicto.

**TRESPASS.** The declaration stated that defendant broke and entered plaintiff's close, broke open his gates, &c., crushed the grass and subverted the soil, &c., and seized and took away from the said close divers, to wit, seven, horses of plaintiff of great value, &c., and drove them to a pound and there imprisoned and impounded them, and kept them so impounded for a long time, to wit, &c., and converted them to his own use; and afterwards, to wit, on, &c., "carried away two of the said horses [812 and sold and disposed thereof, and converted all the said horses to his the defendant's own use; whereby," &c. (averments of damage.)

**Pleas.** 1. Not guilty. 2. As to breaking and entering the close, breaking open the gates, &c., crushing, &c., and subverting, &c., that the close, gates, grass, soil, &c., were not the close, &c. of plaintiff, in manner and form, &c.: conclusion to the country.

3. As to the seizing and taking away the horses, driving them to the said pound, and there imprisoning and impounding, and keeping, &c., and converting them as in the declaration mentioned, and carrying away two of the said horses, and selling and disposing of and converting all the said horses to defendant's own use: That defendant, before and at the time, when, &c., was lawfully possessed of a close, &c.; and because, &c.; averment, that defendant, at the times when, &c., took the horses damage feasant in his said close, as a distress, and led them to the said pound, being a common pound, &c., and there imprisoned and impounded and kept them impounded, &c., for the space of time in the declaration mentioned, and converted the same in manner and form, &c. "And the said defendant further says that, while the said horses of the said plaintiff remained and continued so imprisoned, impounded," &c., "as aforesaid, and long after the making and passing of a certain act," &c., (5 & 6 W. 4, c. 59,) "he the said defendant found, provided and supplied the said horses of the said plaintiff, so impounded as aforesaid, daily during all such time with good and sufficient food and nourishment: and the said defendant further says that, instead of proceeding for the recovery of the \*value of the said [813 food and nourishment or any part thereof before a justice of the peace, after the expiration of seven clear days from the time of impounding the said horses as aforesaid, and before the commencement of this suit, to wit, on," &c., "he the said defendant carried away, sold and

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And, where defendant had obtained a verdict on such plea not containing the above allegation, judgment was given non obstante veredicto.

**TRESPASS.** The declaration stated that defendant broke and entered plaintiff's close, broke open his gates, &c., crushed the grass and subverted the soil, &c., and seized and took away from the said close divers, to wit, seven, horses of plaintiff of great value, &c., and drove them to a pound and there imprisoned and impounded them, and kept them so impounded for a long time, to wit, &c., and converted them to his own use; \*and afterwards, to wit, on, &c., "carried away two of the said horses [\*812 and sold and disposed thereof, and converted all the said horses to his the defendant's own use; whereby," &c. (averments of damage.)

**Pleas.** 1. Not guilty. 2. As to breaking and entering the close, breaking open the gates, &c., crushing, &c., and subverting, &c., that the close, gates, grass, soil, &c., were not the close, &c. of plaintiff, in manner and form, &c.: conclusion to the country.

3. As to the seizing and taking away the horses, driving them to the said pound, and there imprisoning and impounding, and keeping, &c., and converting them as in the declaration mentioned, and carrying away two of the said horses, and selling and disposing of and converting all the said horses to defendant's own use: That defendant, before and at the time, when, &c., was lawfully possessed of a close, &c.; and because, &c.; averment, that defendant, at the times when, &c., took the horses damage feasant in his said close, as a distress, and led them to the said pound, being a common pound, &c., and there imprisoned and impounded and kept them impounded, &c., for the space of time in the declaration mentioned, and converted the same in manner and form, &c. "And the said defendant further says that, while the said horses of the said plaintiff remained and continued so imprisoned, impounded," &c., "as aforesaid, and long after the making and passing of a certain act," &c., (5 & 6 W. 4, c. 59,) "he the said defendant found, provided and supplied the said horses of the said plaintiff, so impounded as aforesaid, daily during all such time with good and sufficient food and nourishment: and the said defendant further says that, instead of proceeding for the recovery of the \*value of the said [\*813 food and nourishment or any part thereof before a justice of the peace, after the expiration of seven clear days from the time of impounding the said horses as aforesaid, and before the commencement of this suit, to wit, on," &c., "he the said defendant carried away, sold and

disposed of the said horses so sold as in the said declaration mentioned, openly and by public auction, at a certain public market held at, &c., "called (to wit) the market-place, Whittlesea (after having given and published, three days previously to such sale, to wit, on," &c., "a public printed notice, at," &c., "of the said impounding and sale thereof pursuant to the said act of parliament,) for a certain sum of money, to wit, the sum of 15*l.* 10*s.* being the most money that could be got for the same; and that the said defendant then applied the said money, being the produce of the said sale, in discharge of the value of such food and nourishment so supplied as aforesaid, and the expenses of and attending such sale, according to the statute in such case," &c., "as it was lawful for the said defendant to do for the cause aforesaid; which are the same alleged trespasses," &c. Verification.

Replication, joining issue on pleas 1 and 2. To plea 3, *De injuriâ*. Issue thereon.

On the trial, before PARKE, B., at the Cambridgeshire Spring assizes, 1845, it appeared that seven horses were impounded, and two sold. A verdict was found for the plaintiff on the 1st issue, and for the defendant on the 2d and 3d. The learned judge was of opinion that, under sect. 4 \*814] of the statute, (a) the defendant was "entitled to sell as many horses (and so many only) as would pay for the keep of the seven; and he observed that the plaintiff had not new assigned.

(a) Stat. 5 & 6 W. 4, c. 59, s. 4, after reciting that "great cruelties are practised by reason of keeping and detaining horses," &c., "impounded and confined without food frequently for many days," enacts, for remedy thereof, "That from and after the passing of this act every person who shall impound or confine, or cause to be impounded or confined, any horse, ass, or other cattle or animal, in any common pound," &c., "or in any enclosed place, shall and he is hereby required to find, provide, and supply such horse, ass, and other cattle or animal so impounded or confined, daily with good and sufficient food and nourishment for so long a time as such horse, ass," &c., "shall remain and continue so impounded or confined as aforesaid; and every such person who shall so find, provide," &c., "any such horse, ass," &c., "with such daily food and nourishment as aforesaid, shall and may and he and they are hereby authorized and empowered to recover of and from the owner or owners of such cattle or animal not exceeding double the full value of the food and nourishment so supplied to such cattle or animal as aforesaid, by proceeding before any one justice of the peace within whose jurisdiction such cattle or animal shall have been so impounded and supplied with food as aforesaid, in like manner as any" penalty, &c., may be recovered under this act, and which value the justice is, by this clause, authorized "to ascertain, determine, and enforce as aforesaid; and every person who shall have so supplied such food and nourishment as aforesaid shall be at liberty, if he shall so think fit, instead of proceeding for the recovery of the value thereof as last aforesaid, after the expiration of seven clear days from the time of impounding the same, to sell any such horse, ass," &c., "openly at any public market (after having given three days' public printed notice thereof) for the most money that can be then got for the same, and to apply the produce in discharge of the value of such food and nourishment so supplied as aforesaid, and the expenses of and attending such sale, rendering the overplus (if any) to the owner of such cattle or animal." Sect. 6 imposes a penalty on the person impounding, who shall refuse or neglect to provide food for such horse, &c.

Sect. 21 enacts, "That whenever in this act, with reference to any person, cattle, animal, matter, or thing, any word or words is or are used importing the singular number or the masculine or feminine gender only, yet such word or words shall be understood to include several persons or animals as well as one person or animal, and females as well as males, and several matters or things as well as one matter or thing, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction."

\*In Easter term, 1845, a rule nisi was obtained for judgment non obstante veredicto on the 3d issue.(a) [\*815]

*Gunning* and *Couch* now showed cause. The objections to the plea are, first, that, if a distress of seven horses is taken, and they are impounded, two cannot be sold for the keep of the seven; or, secondly, that, if they may, the plea ought to allege that the two were necessarily sold to pay for such keep. The 3d plea follows the language of stat. 5 & 6 W. 4, c. 59, s. 4. By that clause, the person impounding any horse (which, by sect. 21, may be construed to mean horses if the context allows it) is bound to supply food and nourishment for such horse while impounded, and is authorized, after seven days, to sell such horse and apply the produce "in discharge of the value of such food and nourishment so supplied as aforesaid." The plea states that the defendant did sell the two horses for the value of the food "so supplied as aforesaid," that is, in the language of the earlier part, "supplied" to "the said horses of the said plaintiff, so impounded as aforesaid." Sect. 4 empowers the distrainer to apply the produce of sale in paying for the food, &c., "so supplied as aforesaid;" that is, not to the horse or horses sold, but to "such cattle or animal as aforesaid," namely, the cattle or animal impounded. It cannot be the meaning of sect. 4 that, if several horses are taken, each must be sold for the cost of that horse's food, although each horse may be worth 100*l*. The justification is good after verdict. If the plaintiff meant to allege that two horses were more than the defendant ought to have sold, he should \*have new assigned. [Lord DEN- [\*816] MAN, C. J. Supposing your construction of the statute to be right, still, as the defendant sold more than one horse, ought not the plea to show that it was necessary to sell more than one for the general expenses? COLERIDGE, J. On these pleadings nothing turns upon the want of a new assignment.] The statute, in sect. 4, virtually gives a form of plea; and that has been followed. Supposing that, according to the strict construction of this clause, each horse is to be sold for its own keep, the plea is consistent with that supposition, and answers the count: for the action is trespass; and, if the two horses were sold for their own respective expenses, an application of part of the money to the expense of the other horses would not make the defendant a trespasser ab initio, such application not being itself a fresh trespass; *Shorland v. Govett*, 5 B. & C. 485. [COLERIDGE, J. Professing to sell under a statutory power, must not you show that the statute has been complied with in all respects?] To retain part of the price for a purpose not authorized might be an abuse of the statutory authority, but would not make the distrainer a trespasser ab initio. [Lord DENMAN, C. J. You say that this, if a wrongful act, is subsequent to every act of trespass.] It is; and, as BAYLEY, J., said in *Shorland v. Govett*, "Where the subsequent act is a trespass, the law as-

(a) Also for a new trial, on the ground, among others, of an alleged erroneous ruling as to the necessity of a new assignment.

sumes that the party did not enter for the purpose alleged in the plea, but for the purpose of committing the trespass. But here the subsequent act was not a trespass, nor can it be reasonably supposed that the original entry was for the purpose of the extortion." A sheriff lawfully arresting a party under \*process of contempt does not become a trespasser \*817] ab initio by detaining him after he is entitled to his discharge; *Smith v. Egginton*, 7 A. & E. 167. On the other hand, assuming that the distrainer must sell only what it is necessary to sell, yet, as the statute gives no express direction, it must be taken as conferring a discretionary authority to sell so many as the party supposes may be requisite. He is to sell by auction, and cannot be certain what price any horse or horses will fetch, or what the expenses of sale may be. The words of sect. 4 empower the distrainer to sell "any such horse," &c. : but it seems to follow from the construction attempted on the other side that he could not justify putting up for sale any horse or horses but such as it was necessary to sell for the amount actually become due: the result of which would be that, in many instances, he could not be safe unless he sold each horse individually in discharge of its own expenses; for there could not be a second sale for the general expenses; and therefore, if he once sold a certain number to raise money for the whole, and the produce was insufficient, he would have no further remedy.

*Byles*, Serjt., contra. Either each animal is to be sold for the expenses of each, or as many must be sold as will pay the actual cost of all. The latter, certainly, is a reasonable construction: for it cannot be said that, if 500 sheep were distrained damage feasant, the whole ought to be sold to pay, perhaps, 2s. 6d. But, assuming this construction to be acted upon, parties availing themselves of the statute must allege in pleading \*818] that it was necessary to sell so many, and that they \*at once did so; or that they sold one and it did not produce enough, and then they sold more. Here no such averment is made: and it is not shown whether the amount of the keep and expenses of sale equalled, or exceeded, the sum raised. (He was then stopped by the court.)

LORD DENMAN, C. J. The sense of the statute, in sect. 4, is, that the distrainer may sell to meet the exigency which arises; he must exercise a reasonable discretion, and act bonâ fide. But, if he sells two horses to pay the expenses of seven, he is bound to show, in an action like this, that he did sell what was necessary, according to a proper exercise of discretion. The rule must be absolute for judgment non obstante verdicto.

WILLIAMS, J.(a) The learned judge at the trial cannot have pronounced judicially whether or not the averment of necessity was essential: the only question there must have been whether or not the necessity was proved. The case has been ingeniously argued by Mr. *Couch* as if the question were whether a right to sell the two horses existed at all; but

(a) Patteson, J., was absent on account of ill health.

the real point is whether the defence, as pleaded, was a good answer under the statute. The act gives a distrainor two modes of remedy for the expense of keeping the animals impounded. He may proceed before a justice in the same manner as for a forfeiture; or he is empowered to help himself; he may, if he thinks proper, sell, to indemnify himself for the keep. But, after satisfying those expenses, and the cost of sale, he is to render the overplus, if any, \*to the owner of the distress: that [\*819 implies that what is sold must have been necessarily sold for the purpose of reimbursement, and that the power is measured by the necessity. I think, therefore, that, in pleading, the necessity ought to be averred, and that, for want of such averment, this is not a good plea.

COLERIDGE, J. The true construction of the clause appears from its object, which is that no cruelty should be inflicted upon animals impounded, but that the distrainor should feed them, and be repaid what he is obliged to expend for that purpose. To obtain repayment he may go before a magistrate, or he may sell, and reimburse himself. But, as, before a magistrate, he would obtain only satisfaction for the keep of all the animals distrained, so, if he sells, his indemnity must be limited to the amount of what has actually been supplied. Mr. *Couch* has suggested the difficulty that, if the power of sale be strictly limited, the distrainor may not ultimately be reimbursed, because he cannot make a second sale: but, if he is obliged to keep the distress for an indefinite period, I know nothing to prevent his selling from time to time as it becomes necessary. The intention of the act clearly is that what he sells should be what it is necessary to sell: and, when he pleads the sale as a defence, he should say, "I sold for what it was necessary to raise."

LORD DENMAN, C. J. We do not decide that the defendant was a trespasser ab initio, but only that a part of what he did is not justified by the pleading.

Rule absolute to enter judgment for plaintiff on the 3d issue, non obstante veredicto.

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\*LEE against MERRETT. *Monday, April 27th.* [\*820

A sum of money allowed in account by mistake on a settlement between plaintiff and defendant, when defendant paid the balance after deduction of that sum, cannot be recovered back in an action for money had and received, the sum allowed never having passed between the parties otherwise than by such allowance.

ASSUMPSIT for money had and received, and on an account stated. Particular of demand, for "24l. 9s. received on the 8th day of February, 1843, by the defendant of the plaintiff, to his use." Plea: Non assumpsit.

On the trial, before ERLE, J., at the Wiltshire Spring assizes, 1845, it appeared that, in 1843, the plaintiff, who was the vicar of North Bradley,

in Wiltshire, demanded 26*l.* 8*s.* of the defendant for tithes. On examination of accounts between the parties, it appeared that, in a former year, the defendant, being then way-warden, had paid 24*l.* 9*s.* on the plaintiff's account for highway rates. Credit was therefore given to defendant for that sum in the settlement: and he paid plaintiff the remaining 1*l.* 19*s.* Defendant also gave a written memorandum, stating that plaintiff demanded 26*l.* 8*s.* for tithe, and that defendant deducted from that sum 24*l.* 9*s.*, leaving 1*l.* 19*s.* balance. Afterwards it was discovered that the 24*l.* 9*s.* due from plaintiff had been allowed to defendant in a former settlement of account; and the present action was brought to recover back that sum, as paid in ignorance of the fact. It was contended, on defendant's behalf, that the action did not lie. For the plaintiff it was urged that the case was analogous in principle to that in which A. owes 100*l.* to B., and B. 100*l.* to C., and it is agreed among all the parties that \*821] A. shall pay C. the 100*l.*, and thereupon C. becomes \*entitled to recover the 100*l.* of A.(a) The learned judge reserved leave to move to enter a nonsuit if the court should be of a different opinion: and the plaintiff had a verdict.

*Kinglake*, Serjt., in the ensuing term, moved according to the leave reserved, and contended that the action for money had and received did not lie, no money having passed except the balance, not in dispute, of 1*l.* 19*s.* He cited *Wharton v. Walker*, 4 B. & C. 163. A rule nisi was granted.(b)

*Crowder* now showed cause.(c) The only question is on the form of action. If, on the second settlement, the defendant had laid down 26*l.* 8*s.* in money and received back 24*l.* 9*s.*, there could be no doubt. [COLERIDGE, J. In this case, how has the 24*l.* 9*s.* ever been money?] The allowance of it is the same as if money passed. [LORD DENMAN, C. J. For every purpose, perhaps, except supporting this form of action. COLERIDGE, J. The sum allowed to the defendant never had been money of the plaintiff. It is as if the plaintiff had brought in a bill, and the defendant had said, "I have paid you before."] Where money has been extorted, or fraudulently or unconscientiously received, this action lies. It is not clear that, in the present case, any other would. [LORD DENMAN, C. J. The plaintiff might sue for his tithe; the transaction proved would be no answer. COLERIDGE, J. The fact that the allowance is \*822] \*account was wrongful would be as material in that action as in this. According to your argument, money had and received would lie whenever an improper deduction had been made in settling an account.] The defendant has given, in substance, a receipt for the sum in question: he cannot now deny having received it. In *Wharton v. Walker*, 4 B. & C. 163, the state of facts and relation of parties were

(a) Dictum of Buller, J., in *Tatlock v. Harris*, 3 T. R. 174, 180.

(b) A new trial was moved for on other grounds, but the rule not granted.

(c) Before Lord Denman, C. J., Williams, and Coleridge, Ja.



materially different from those in the present case. In *Lucas v. Jones*, 5 Q. B. 949, writing off a debt on settlement of account was considered a payment of money within the stamp act, 55 G. 3, c. 184. [Lord DENMAN, C. J. It will be much against our present opinion, if we discharge this rule. But we will consider whether it be necessary to hear my brother *Kinglake*.] *Cur. adv. vult.*

Lord DENMAN, C. J., on the next day (April 28th) said: We cannot agree in Mr. *Crowder's* view of this case, and must give our decision for the defendant. *Rule absolute.*(a)

(a) See *Cumming v. Bedborough*, 15 M. & W. 438.

**\*SOLOMON against LAWSON. Monday, April 27th. [\*823**

1. In an action for libel or slander, when the words, written or spoken, are not in themselves applicable to the individual plaintiff, no introductory averment or innuendo can give such an application.

Therefore, where the declaration in the first count, after reciting that plaintiff was employed in supplying fresh water to ships at H., and had, for that purpose, fitted up a schooner with wooden tanks, and that the ship M. being at H., plaintiff conveyed fresh water to the M. in the wooden tanks of his schooner, complained that defendant published, of and concerning plaintiff in his said employment, and concerning the water so supplied to the M., a statement (set forth in the count) that persons on board the M. had become ill soon after leaving H., where they had taken in fresh water; which illness was occasioned by the water; that the water was run into a copper tank whence the casks were filled alongside; that the poison was imbibed from the tank; and that it behoved the authorities to order its removal, and replace it with an iron one: thereby meaning that plaintiff had been guilty of supplying bad and unwholesome water to the M.: judgment on that count was arrested.

2. Where a declaration for libel sets out a publication which refers to a previous publication, but, unless by reference to the language of the previous publication, contains no libel, such previous publication must be considered as incorporated in the publication complained of, and must appear, in the declaration, to be set out verbatim, and not merely in substance.

Therefore judgment was arrested as to the second count of the above declaration, which, after reciting that defendant published a statement "in substance as follows," setting out the publication charged in the first count, charged that defendant afterwards published, of and concerning plaintiff, &c., and of and concerning the first publication, a statement that the copper tank was fitted up in a schooner belonging to plaintiff.

CASE. The first count of the declaration stated that plaintiff, before and at the time of the committing, &c., to wit, on, &c., was a merchant, and carried on business as such merchant at the island of St. Helena, and heretofore, and before and at the time of the committing, &c., was, and still is, accustomed to be employed, for reward in that behalf paid to plaintiff, for the purpose of conveying to, selling, and supplying with fresh water and provisions, from the shores of the said island, divers ships passing by and calling at the said island: That plaintiff, before and at the time of the committing, &c., had, for the better and for the more easily supplying the said ships so calling as aforesaid with water, purchased and procured a certain ship or schooner for a large sum of money, to wit 500*l.*, for the purpose of conveying the said water to and from \*the shores of the said island, to and on board the said ships so [\*824 calling as aforesaid; and had spent divers large sums of money in having the said ship or schooner as aforesaid, fitted up for carrying

the said water as aforesaid, to wit, 500l.; and then had the said ship or schooner fitted up with divers wooden tanks and cisterns for containing, holding, and conveying the said water for the purpose aforesaid: That heretofore, and before the committing, &c., a certain ship, to wit, a ship called the Moffatt, then on her voyage from India to England, with divers persons, passengers, officers, and crew on board, arrived and called at the said island for the purpose of taking a supply of fresh water for the use of the said last-mentioned ship and the said persons, passengers, &c., during her then ensuing voyage from St. Helena aforesaid to England: That thereupon, afterwards, and before the committing, &c., to wit, on, &c., a certain person, then being the captain of the said ship, the Moffatt, then employed plaintiff, and agreed with him for, and plaintiff did then sell, convey, and deliver on board the last-mentioned ship, a large quantity of fresh water, to wit, 300 hogsheads of fresh water, of great value, to wit, &c., for the use or supply of the said ship as aforesaid during her then voyage to England; and plaintiff did then convey the same to and on board the last-mentioned ship, in the wooden tanks and cisterns of the said ship or schooner of plaintiff, from the shore of the said island: That afterwards, and after taking on board the said water, to wit on, &c., the said ship, the Moffatt, did arrive in the river Thames, from off her said voyage from India, after so touching at St. Helena as aforesaid: That the plaintiff hath always conducted himself, \*825] as well in the way of his said business and occupation \*as otherwise, with skill, care, judgment, and integrity, and hath never been guilty, nor, until the committing, &c., been suspected, &c., of conveying, selling or supplying, or endeavouring to convey, or sell or supply, to ships passing by and calling at the said island, bad or unwholesome or poisonous water; nor of conveying or carrying water to the said ships or vessels in copper tanks, or of any other the misconduct hereinafter mentioned to have been imputed to him: That the said water, before and at the time of the committing, &c., which was supplied to the said ship, the Moffatt, by plaintiff as aforesaid, was good, fresh, and wholesome water. Yet defendant, well knowing, &c., but contriving, &c., to injure plaintiff in his said trade or business and employment as aforesaid, and to cause it to be suspected and believed that plaintiff had conveyed, sold, and supplied to the said ship, the Moffatt, unwholesome, poisonous, and bad water, and that plaintiff had been and was in the habit of conveying the said water on board the said ships, and had conveyed the water aforesaid to the ship, the Moffatt, in copper tanks, which were unwholesome and unfit for use, and to vex, &c., plaintiff, heretofore, to wit, on, &c., wrongfully, maliciously, and injuriously printed and published, and caused to be, &c., in a certain newspaper called "The Times," of and concerning plaintiff, and of and concerning him in the way of his said trade or business and employment respectively, as aforesaid, and of and concerning the water so supplied to the said ship, the Moffatt, as afore-

said, and of and concerning plaintiff's conduct in and about the selling, conveying, and delivering the said water on board the said ship, the *Moffatt*, as aforesaid, a certain false, scandalous, malicious, and defamatory \*libel, containing the false, &c., and libellous matters follow- [\*826  
ing, of and concerning plaintiff, and of and concerning him in the way of his said trade or business and employment respectively, as aforesaid, and of and concerning the water so supplied to the said ship as aforesaid, and of and concerning his conduct in and about the selling, conveying, and delivering the said water on board the said ship, the *Moffatt*, as aforesaid, viz.

“To the Editor of *The Times*. Sir,—The following shocking occurrence deserves to be made known, as it may be the means of saving the lives of passengers from India. ‘The ship *Moffatt*’ (meaning the aforesaid ship) “arrived from Bombay on Saturday; and the passengers landed in almost a dying state. It appears, from a statement made by two of the sufferers, who are officers in the army and are come home on sick leave, that they were all tolerably well up to their arrival at St. Helena, where, as is customary, they took on board fresh water: and in a few days after leaving that island they were all seized with violent pains and vomiting, which continued daily up to their arrival in England. Their gums became black, and the under part of the tongue black. No one, not even the doctor, who equally suffered with the captain and his wife, could account for it. But there is no doubt that their illness was caused by the water; and it appears the water is run into a copper tank at St. Helena, from whence the casks are filled alongside. There is no doubt, therefore, that the poison is imbibed from this copper tank; and it behoves the authorities immediately to order its removal, and replace it with an iron one. I saw the two young officers this day, \*suffer- [\*827  
ing the most dreadful agony. I should be glad to hear, from the passengers of other ships from India, whether they have been like sufferers by the St. Helena water, in order that a proper representation may be laid before government, which there is no doubt the captain and owners of the *Moffatt* will feel it necessary to do. I remain, Sir, yours most obediently,  
NAUTICUS.

“October 9th.

“P. S. I find, in your paper of to-day, not less than 37 vessels announced as having put into St. Helena.”

(Thereby then and there meaning and intending that the plaintiff had been guilty of selling, conveying and supplying bad and unwholesome water to the said ship, the *Moffatt*.)

Second count. That, after the said arrival of the said ship the *Moffatt* in the river Thames as aforesaid, and before the committing, &c., hereinafter mentioned, to wit, on, &c., defendant caused to be printed and published in the said newspaper a certain letter or statement, in substance as follows; that is to say:

“To the Editor of The Times, &c.” (Setting out verbatim, without innuendoes, the letter set out in the first count.)

And defendant, further contriving, &c., as aforesaid, afterwards, and after the publication of the said last-mentioned letter or statement, to wit, on 17th October, A. D. 1844, falsely, &c., and maliciously did publish a certain other false, &c., libel, of and concerning plaintiff, and of and concerning him in the way of his said trade or business and employment as aforesaid, and of and concerning the water so supplied and delivered by him on board the said ship the Moffatt as aforesaid, and of and concerning \*828] ing \*his conduct in and about the selling, conveying and delivering the said water on board the said ship, and of and concerning the said last-mentioned letter or statement, containing, amongst other things, the false, &c., and libellous matter following, of and concerning plaintiff, and of and concerning him in the way of his said trade, &c., as aforesaid, and of and concerning the water so supplied and delivered by him on board the said ship the Moffatt as aforesaid, and of and concerning his conduct in and about the selling, conveying and delivering the said water on board the said ship, and of and concerning the said last-mentioned letter or statement: (that is to say:)

“To the Editor of The Times.

“St. Helena water.

“Sir, I beg leave to correct an error I was led into regarding the passengers by the ship Moffatt, from Bombay, being poisoned by the water supplied at St. Helena from a copper tank. I stated the tank belonged to government. This is an error. The copper tank is fitted up in a small schooner belonging to Mr. Solomon,” (thereby meaning the plaintiff,) “which runs alongside the ships, as they arrive, to supply them with water. Captains of ships homeward bound will therefore do well to be warned of the fatal consequences that may result from taking in water that has probably been lying some days in a copper tank, the evil effects of which they can ascertain by inquiry of the captain, doctor, or owner of the Moffatt,” (thereby meaning the said ship the Moffatt aforesaid.) “The doctors pronounce it to be a decided case of poison. I am, Sir, your most obedient servant, NAUTICUS.”

\*829] \*(Thereby then meaning and intending that the said water, so supplied and delivered by plaintiff to the said ship, the Moffatt, as aforesaid, was bad, unwholesome, and poisonous.)

Then followed a general statement of damage to plaintiff in his character and trade: and that he hath been and is greatly vexed, &c., greatly hindered and prevented in and from supplying the said ships, so calling at the said island, with fresh water and other provisions, and hath thereby been deprived of divers great gains, &c., and by means whereof the masters of divers ships have refused to take their fresh water and provisions from plaintiff, as they otherwise might and would have done, (not stating any particular instance.)

Pleas: Not guilty; 2. That the water was not good, &c.; 3. A justification. Replication: to the 1st and 2d pleas, similiter; to the third, De injuriâ, on which issue was joined.

On the trial, before Lord DENMAN, C. J., at the Surrey Spring Assizes, 1845, a general verdict was found for the plaintiff. In Easter term, 1845, *Shee*, Serjt., obtained a rule nisi for arresting the judgment; or for a venire de novo.

In last Hilary vacation, (a)

*M. Chambers*, *Butt*, and *Edwin James* showed cause.

The objection to the first count is, that none of its allegations directly points to the plaintiff. The answer is, that, if words charged as a libel be ambiguous or equivocal, after verdict the court will give them that \*construction which the jury has given. In 1 Starkie on Slander, [ \*830 2d ed., p. 418, it is said: "An innuendo is frequently necessary, where the language of the defendant is apparently innocent and inoffensive, but where, nevertheless, by virtue of its connection with known collateral circumstances, it conveys a latent and injurious imputation." The same doctrine, in effect, is to be found at p. 387, and p. 391. *Gutsole v. Mathers*, 1 M. & W. 495; S. C. Tyrwh. & Gr. 694, cited in moving for the rule, is in the plaintiff's favour. The decision there amounts only to this, that it must appear on the face of the declaration "by the words or signs themselves," "that they may bear the interpretation put upon them." The court, therefore, will uphold the finding of the jury, if it is possible that the words can bear the meaning imputed to them. If the opposite doctrine, that the court will endeavour to find out an innocent meaning, ever prevailed, it has long ceased to be the rule. Even as long ago as the case of *Fleetwood v. Curle*, Cro. Jac. 557; S. C. 2 Roll. Rep. 148, the words "Mr. Deceiver" were held to support the innuendo, "meaning the plaintiff," after verdict. [PATTESON, J. But a difficulty here is, that, whereas the first count alleges, by way of introductory averment, that the plaintiff supplied water to vessels from a tank in a schooner, the language of the libel seems necessarily to apply to a tank on the land.] That is not the necessary construction. The words will bear the meaning that the tank, from whence the vessels are "filled alongside," was a tank conveyed in a schooner. The case is quite different from those where the question has been whether a declaration is supported by a \*proper colloquium, *Peake v. Oldham*, 1 Cow- [ \*831 per, 275, referred to in *Goldstein v. Foss*, 6 B. & C. 154, 159; (b) *Clement v. Fisher*, 7 B. & C. 459; *Sweetapple v. Jesse*, 5 B. & Ad. 27; and it resembles *Hughes v. Rees*, 4 M. & W. 204; *Ingram v. Lawson*, 6 New Ca. 212, and *Gardiner v. Williams*, 2 C., M. & R. 78; S. C. 5 Tyrwh. 757, where Lord ABINGER, C. B., says, "Any assignable case

(a) The case was argued on February 11th, before Lord Denman, C. J., Patteson, and Williams, Js.; and on February 13th and 14th, before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

(b) Affirmed, on error, in Exchequer Chamber; *Goldstein v. Foss*, 4 Bing. 489.

which will support the verdict must be presumed ;” which decision was upheld on error ; *Williams v. Gardiner*, 1 M. & W. 245 ; S. C. Tyrwh. & Gr. 578. It is not essential that the name should appear in the libel. The inducement states that the plaintiff supplied water in tanks for the *Moffatt* : then the innuendo connects the libel with that employment of the plaintiff. That is the proper office of an innuendo ; and then the jury are to verify the innuendo, as they have done. The case is as if a defendant charged that a goldsmith sold copper for gold, or that a brewer sold unwholesome beer, or that a seller of woad mixed black mould with his woad, all of which would be actionable even if only expressed orally ; Com. Dig. *Action upon the case for Defamation*, (D 26,) (D 27,) citing 1 Rol. Abr. 62, 63, tit. *Action sur case*, (V,) pl. 27, 28, 31. Even if the tank belonged to the “authorities,” it would be a libel to impute to the plaintiff that he had supplied unwholesome water thence to the ship. [PATTESON, J. It is not said that the defendant meant to charge the plaintiff with doing this knowingly.]

The second count is objected to, on the ground that the letter in the *Times* of October 9th, is not averred therein to be set out verbatim, \*832] but only “in \*substance.” But that count takes the second letter as that containing the libel, and sets out the first letter only as an introduction. To hold the count bad on this ground would therefore be departing from the elementary rule, that, in the inducement, words or writings require only to be set out in substance, but that the libel itself must be set out in *hæc verba*. A case may easily be imagined of a series of letters, of which the last only contained a libellous averment, but yet could not be understood except by reference to that portion of the series which preceded it. And the reason of this rule is laid down in 1 Starkie on Slander, (2d ed.) p. 400. “With respect to the allegation of collateral circumstances, in reference to which the publication is actionable, care should be taken not to allege them too minutely, and not to allege more than is necessary, for where the actionable quality of the publication depends wholly on its connection with collateral matter, a variance in proof of those matters has frequently been held to be fatal.” And no reason can be given why, when such collateral circumstances consist of writings, they should not be set out compendiously as well as other facts. [PATTESON, J. It is not averred in this count that the first letter was “of and concerning the plaintiff.”] That shows, still more distinctly, that it is inserted only by way of inducement. Co. Lit. 303 a, Com. Dig. *Pleader*, (E. 10,) are in favour of the plaintiff on this point. *Cook v. Cox*, 3 M. & S. 110, and *Wright v. Clements*, 3 B. & Ald. 503, were cited on moving for the rule. But the effect of these cases is only that the words charged as slanderous, or the writing charged as libellous, must be set out ; which proves nothing as to words or \*833] \*writings introduced merely to explain and point that which is the actual slander or libel. If this objection prevail, it will



follow that a colloquium cannot be averred without setting out the whole of the colloquium fully. But the omission to do so cannot prejudice the defendant; for, if the effect of the colloquium be inaccurately described, he is not, by the generality of the allegation, prevented from taking advantage of the variance, as appears from *Shepherd v. Bliss*, 2 Stark. N. P. C. 510. In *Buckingham v. Murray*, 2 C. & P. 46, the libel complained of consisted of certain words in an index to a book; and it was held unnecessary to set out the words of the book itself to which the index purported to refer. If this mode of declaring be wrong, it is not easy to see how the declaration could be framed at all.

*Shee*, Serjt., and *Peacock*, contra. Such averments in the first count as are material cannot be rejected after verdict; the plaintiff must therefore rely upon the interpretation which he has given, on the record, of the alleged libel. Then the court must see that the writing is such as to be capable of that interpretation. It is a material averment that the publication was of and concerning the plaintiff in his way of business; *Johnson v. Aylmer*, Cro. Jac. 126; *Lowfield v. Bancroft*, 2 Str. 934; *Rex v. Marsden*, 4 M. & S. 164. But the writing itself does not appear to be so, and cannot be made so by an innuendo merely; *Rex v. Alderton*, Sayer's Rep. 280; *Rex v. Horne*, 2 Cowp. 672, 684, 1 Rol. Abr. 81, tit. *Action sur Case* (H), pl. 12; *James v. Rutlegh*, 4 Rep. 17. The verdict \*will not help; *Hughes v. Rees*, 4 M. & W. 204, [\*834 207. In *Fleetwood v. Curle*, Cro. Jac. 557, S. C. 2 Rol. Rep. 148, the colloquium explained the words sufficiently to support the innuendo: in the case of writing, the introductory averments answer to the colloquium, and are subject to the same rule. It may be conceded that the doctrine of interpreting language in mitiori sensu no longer prevails to the same extent as formerly. But here a statement is made, affecting no particular person; and then the plaintiff comes forward and insists that it shall be understood that he was charged by it. [PARTESON, J. If a writing stated that a great fire had occurred, it would not do to call that a libel and try to make it so by adding innuendoes that the meaning was that the plaintiff had wilfully caused the fire: but, if it were stated that "somebody" had done so, might not the plaintiff then declare with an innuendo that "somebody" meant him?] That could not be done, according to the decisions: but here is no charge against any one, except perhaps "the authorities," that is, according to the construction adopted in *Rex v. Burdett*, 4 B. & Ald. 314, the authorities exercising government. No connection appears between the copper tank, into which it is said that the water is run, and the plaintiff's wooden tanks.

As to the second count. *Gutsole v. Mathers*, 1 M. & W. 495; S. C. Tyrwh. & Gr. 694, shows, at least, that the words, whether spoken or written, which are charged as slanderous or libellous, must be set out, in order "that the court may see there is a charge on the defendant which he is bound to answer."

\*835] \*This is also the principle of *Zenobio v. Axtell*, 6 T. R. 162; *Cook v. Cox*, 3 M. & S. 110; *Wright v. Clements*, 3 B. & Ald. 503; and *Wood v. Brown*, 6 Taunt. 169. The rule manifestly applies, not merely to such words as are formally declared upon as the gist of the complaint, but to all words which are essentially necessary to make the words which are formally declared upon intelligible or actionable at all. In that case, the whole of what is spoken or written is incorporated, and makes up the slander or libel. The introductory matter here is necessary, not merely for explaining what is charged as the libel, but for making it a libel at all. [*Butt.* Charges in a libel are divisible; *Figgins v. Coswell*, 3 M. & S. 369.] That is where there are distinct complete charges: here the second letter, which is declared upon, contains no charge. The finding of the jury is, in effect, that the two together make a libel. The defendant could not justify by alleging only the truth of the contents of the second letter. The plaintiff has no right to place only what he chooses to treat as the substance of the writing on the record: if the very words were set out, it might appear that the substance was otherwise. It is suggested that the principle for which the defendant contends would make it impossible to frame a declaration in this case. But, if that be so, it is because there is no legitimate ground of action.

*Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court.

\*836] This is an action for a libel: and the declaration \*contains two counts, upon which a general verdict was found for the plaintiff: and a motion has been made in arrest of judgment.

The first count states that the plaintiff is a merchant at St. Helena, and employed by captains of vessels touching at the said island to supply them with fresh water, specifying the manner in which the said vessels are so supplied; that a certain vessel, called the *Moffatt*, applied to plaintiff for water, and was supplied out of wooden tanks; that defendant published, of plaintiff and his said trade, and of the said supply of water to the said ship the *Moffatt*, a libel in the form of a letter, which is as follows. (His lordship here read the letter set out in the first count, with the innuendo:) *Meaning and intending that the plaintiff* had been guilty of selling, conveying and supplying bad and unwholesome water to the said ship the *Moffatt*.

And the objection to this count is, that, although the imputation, if applied to the plaintiff in his trade and employment, be clearly actionable, there is, in truth, no imputation upon the plaintiff or any other individual whatsoever. In the course of the argument, many cases were cited for the purpose of showing the object and use of preliminary allegations, and the proper office of an innuendo. We do not, however, deem it to be necessary to enter into a detailed examination of those cases, because it was properly admitted in the argument that the introductory averments do sufficiently explain the trade and employment of the plain-

tiff; and because no innuendo was questioned, except the last, above set out.

And that really involves the whole. If there be contained in the alleged libel matter which is capable of \*receiving the interpretation put upon it by that innuendo, there is no fault in the count for not having explanatory averments to fix and point the libel. But, generally, if the words written or spoken cannot apply to the individual plaintiff, no previous averments or subsequent innuendoes can help to give the words an application which they have not. And that is the reason why the words must be set out, as was observed by Lord ABINGER in giving the judgment of the court in the case of *Gutsole v. Mathers*, 1 M. & W. 495; S. C. Tyrwh. & Gr. 694. “It ought, therefore, to appear to the court, upon the face of the declaration, by the words or signs themselves, that they are sufficient to support such innuendoes or averments as may be necessary to apply to the subject.” Suppose the words to be “a murder was committed in A.’s house last night:” no introduction can warrant the innuendo “meaning that B. committed the said murder;” nor would it be helped by the finding of the jury for the plaintiff. For the court must see that the words do not and cannot mean it, and would arrest the judgment accordingly. *Id certum est, quod certum reddi potest.*

The question, therefore, is, whether the alleged libel has any reference to any individual. In the commencement, a statement is made of sickness on board the *Moffatt*; of their having taken in water at St. Helena, and the sickness beginning soon after; that there is no doubt that the illness was caused by the water; and it appears that the water is run into a copper tank at *St. Helena, from which the casks are filled alongside*: there is no doubt, therefore, that the poison is imbibed from the copper tank: and it behooves the authorities \*to replace it with an iron one. The obvious impression from reading this statement is, that the tank was upon the shore, to which the ships came to be filled; and also that, as “the authorities” (meaning something opposed to an individual) are called upon to interfere, the tank belonged to the authorities.

Suppose, however, (which is perhaps assuming a good deal,) that the tank may mean a tank on board a vessel fitted up to supply others with water, and that “the authorities” are called upon to put down a nuisance belonging to some individual. Still the question recurs, *what* individual? None is pointed at; there is nothing to show that the plaintiff *alone* had a schooner with a tank to supply ships with water at St. Helena; it is uncertain, therefore, what number of persons there may be at St. Helena similarly situated, to all of whom the observation would equally apply, and to some particularly. We think, therefore, that there is nothing in the letter which warrants the innuendo applying the imputation of misconduct to the plaintiff; and that this count cannot be sustained.

The second count sets out *in substance* the letter already observed upon, and then the following, in hæc verba.

(His lordship then read the second letter set out in the second count, p. 828, *antè*.)

And the question upon this second count is, whether the two letters taken together constitute the libel, or whether the second letter, *per se*, can be considered *the* libel, and the first only introductory matter. Upon the former supposition, we are not aware that it was attempted to support the count; nor do we think it was possible to do so, in the face of such \*839] numerous \*and unvarying authorities. In addition to the case already cited we may briefly advert to some others. In *Cook v. Cox*, 3 M. & S. 110, judgment was arrested in an action of slander, because the words themselves were not set out. In *Wood v. Brown*, 6 Taunt. 169, (a case of libel,) the declaration was held bad on *general* demurrer, for not setting out the libel. And, lastly, not to waste time by unnecessary citation, in *Wright v. Clements*, 3 B. & Ald. 503, judgment was arrested for the like defect, the libel being set out (as here) “in substance, as follows; that is to say.” The learned judges there distinguish *substance* and *tenor*, observing that “tenor” has acquired a technical sense, and implies that the libel is set out in *hæc verba*; and HOLROYD, J., compares the case of libel to that of forgery, in which it is well known that the forged instrument must have been set forth in words and figures described, *as it is*, but for the recent statute of 2 & 3 W. 4, c. 123, sect. 3.

Then, are the two letters incorporated, and is the first, by reference, made part and parcel of the second? Now, the second letter is averred to be published (*inter alia*) of and concerning the first. The second letter begins by correcting an error the writer (the same writer Nauticus) was led into in his former statement, which can only mean the statement in the first letter. The error is then said to be, in stating *the* tank to belong to the government. But, what tank? It must mean *the* tank to which such mischievous consequences are attributed in the first letter. It \*840] then asserts that *the* tank is fitted up in a schooner of the \*plaintiff; and cautions captains homeward bound against taking in water which has probably been long lying in a copper tank, and again reverts to the effects upon the *Moffatt*, *but not in the same terms*. In the first letter, the symptoms are minutely described, to lead to the conclusion that the copper tank produced the sickness; none of which particulars are to be found in the second, though it ends with the doctors pronouncing it “a decided case of poison.”

It was asked, by the learned counsel for the defendant, whether, if a justification had been attempted, it would have been sufficient to confine it to the second letter. This, perhaps, must be considered as an illustration rather than an advancement of the argument, because the answer must depend upon this, whether the second letter can be considered as independent of the first, and a substantive libel; which is the whole question.

Without pronouncing any opinion whether, in the particular case of

libel, it be sufficient to state the substance (as opposed to the tenor) of any writing, though introductory only, we think the second letter is so far connected and identified with it, that the first ought to have been set out, and that, for want of this, the second count is defective.

Rule absolute for arresting judgment.(a)

(a) See the next two cases.

**\*MARY GRIFFITHS against LEWIS. Monday, April 27th. [\*841**

Where a declaration in slander sets out words alleged to have been uttered, some in one discourse, and the remainder in a second discourse, and there are in form but two counts, each containing only the words alleged to have been uttered in one discourse, the declaration will be treated as containing only two counts, though each of such two counts contains separate allegations of the uttering of different words in the particular discourse.

Therefore, if in each count there be any words set out which are slanderous, judgment for plaintiff will not be arrested after verdict, though the damages be general, and some of the separate allegations recite only words not actionable.

The first count stated that plaintiff was a butcher, and that defendant, contriving to cause it to be believed that plaintiff had been and was guilty of, in her said trade, fraudulently using two weights to a steelyard (as to which there was no previous direct allegation) by her used in her said trade, and of using improper and fraudulent weights in her said trade, and thereby to injure plaintiff in her said trade, in a discourse of and concerning plaintiff in her said trade, and of and concerning M., a son of plaintiff and her servant in her said trade, as such servant, and of and concerning plaintiff having, as supposed by defendant, by M. as her agent and servant, "used improper and fraudulent weights" in her said trade, and defrauded and cheated in her said trade, and of and concerning her being, as supposed by defendant, guilty of defrauding and cheating in her said trade, and having, as supposed by defendant, in her said trade, by M. as her agent and servant, fraudulently used two weights to a steelyard by her used in her said trade, spoke, in the presence, &c., of and concerning plaintiff in her said trade, and of and concerning M., as and then being such servant, and of and concerning plaintiff having, as supposed by defendant, by M., as her agent and servant, used improper and fraudulent weights in her trade, and being, as supposed by defendant, guilty of defrauding and cheating in her said trade, and of and concerning plaintiff having, as supposed by defendant, in her said trade, by M., as her agent and servant, fraudulently used two weights to a steelyard, by her used in her said trade, these false, &c. words: M. (meaning the said M., so being such servant) *uses two balls to his mother's steelyard*, (meaning that plaintiff, by M. as her agent and servant, used improper and fraudulent weights in her said trade, and defrauded and cheated in her said trade.) On motion to arrest judgment,

*Held*, that the words being susceptible of both a harmless and an injurious meaning, the innuendo was properly applied to point to the injurious meaning.

The second count, with similar preliminary averments and description of the intention of defendant and subject of the discourse and of the words, adding that the discourse and words were also of and concerning defendant himself, alleged that defendant, in the presence, &c., spoke, in answer to a question put by plaintiff to defendant as to whether defendant had said to G. that plaintiff's son used two balls to plaintiff's steelyard, these false, &c. words: *To be sure I* (meaning defendant) *did* (meaning that defendant had said to G. that plaintiff's son used two balls to plaintiff's steelyard, and also that plaintiff, in her said trade, had, by a son of plaintiff, as her agent and servant, fraudulently used two weights to a steelyard by her used in her said trade;) *I* (meaning defendant) *will swear to it in any court; you, G., have used them for years*, (meaning that plaintiff had in her said trade fraudulently used two weights to a steelyard by her used in her said trade.) On motion to arrest judgment,

*Held*, that the words, as stated and explained, were actionable.

**CASE.** The declaration, after a prefatory averment of plaintiff's good character, stated that plaintiff, before and at the time of the speaking and publishing, &c., "was, and from thence hitherto hath been, and still is, a butcher, and the trade and business of a butcher hath, [\*842



for and during all that time, used, exercised and carried on, and still doth use, &c. ; and, in the way of her aforesaid trade and business, the plaintiff hath always behaved, &c. with honesty, &c., and hath not been, or, until the time of speaking, &c., been suspected to have been, guilty, in her said trade or business, of fraudulently using two weights to a steelyard by her used in her said trade, &c., or of using any fraudulent or improper weight or weights in her said trade, &c., or of any fraud or cheating in her said trade, &c. ; by means of which said several premises plaintiff, before the speaking, &c., not only gained the good opinion, &c., but had also acquired, and was then honestly acquiring, great gains, &c. in and from her aforesaid trade, &c. : yet, defendant greatly envying, &c., and contriving, &c., to injure plaintiff in her aforesaid good name, &c., and to bring her into public scandal, &c., and to cause it to be suspected and believed that she had been and was guilty, in her said trade, &c., of fraudulently using two weights to a steelyard by her used in her said trade, &c., and of using improper and fraudulent weights in her said trade, &c., and of fraud and cheating in her said trade, &c., and thereby to injure plaintiff in her aforesaid trade, &c., heretofore, to wit, on 9th November, 1844, in a certain discourse which he, defendant, then had, in the presence and hearing of divers good, &c., of and concerning plaintiff in her aforesaid trade, &c., and of and concerning one Matthew Griffiths, then being a son of plaintiff, and then also being the servant of the plaintiff in her said trade, &c., and of and concerning the said Matthew G.

\*843] \*as such servant as aforesaid, and of and concerning plaintiff having, as supposed by defendant, by the said Matthew G. as her agent and servant in that behalf, used improper and fraudulent weights in her said trade, &c., and defrauded and cheated in her said trade, &c., and of and concerning plaintiff's being, as supposed by defendant, guilty of defrauding and cheating in her said trade, &c., and of and concerning plaintiff having, as supposed by defendant, in her said trade, &c., by the said Matthew G. as her agent and servant in that behalf, fraudulently used two weights to a steelyard by her used in her said trade, &c., he, defendant, then, in the presence and hearing of the last-mentioned, &c., falsely and maliciously spoke and published of and concerning plaintiff in her aforesaid trade, &c., and of and concerning the said Matthew G. as and then being such servant as aforesaid, and of and concerning plaintiff, having, as supposed by defendant, by the said Matthew G. as her agent and servant in that behalf, used improper and fraudulent weights in her said trade, &c., and defrauded and cheated in her said trade, &c., and of and concerning plaintiff's being, as supposed by defendant, guilty of defrauding and cheating in her said trade, &c., and of and concerning plaintiff's having, as supposed by defendant, in her said trade, &c., by the said Matthew G. as her agent and servant in that behalf, fraudulently used two weights to a steelyard by her used in her said trade, &c., these false, scandalous, malicious, and defamatory words following, (viz.): "Matthew



Griffiths" (meaning the said Matthew G., so being such servant of plaintiff as aforesaid) "uses two balls to his mother's steelyard" (thereby then meaning that plaintiff, by the said Matthew G. as \*her agent and servant in that behalf, used improper and fraudulent weights in her said trade, &c., and defrauded and cheated in her said trade, &c. :) and also the false, &c. words following, viz. : "Matthew Griffiths" (meaning the said Matthew G. so being such son and servant, and as such servant, as aforesaid) "uses two balls to his mother's steelyard," (thereby meaning that plaintiff, by the said Matthew G. as her agent and servant in that behalf, defrauded and cheated, and was guilty of defrauding and cheating, in her said trade, &c. :) and also the false, &c. words following (viz. :) "Matthew Griffiths" (meaning the said Matthew G., so being such son and servant as aforesaid, and as such servant as aforesaid) "uses two balls to his mother's steelyard" (meaning that plaintiff was guilty of defrauding and cheating in her said trade, &c. :) and also the false, &c. words following, (viz. :) "Matthew Griffiths" (meaning the said Matthew G., so being such son and servant, and as such servant as aforesaid) "uses two balls to his mother's steelyard," (thereby then meaning that plaintiff had, in her said trade, &c., by the said Matthew G. as her agent and servant in that behalf, fraudulently used two weights to a steel yard by her used in her said trade, &c.)

And afterwards, to wit, on 1st January, 1845, in a certain other discourse which defendant then had in the presence and hearing of divers other good, &c., of and concerning plaintiff in her aforesaid trade and business of a butcher, and of and concerning plaintiff, as supposed by defendant, having used improper and fraudulent weights in her said trade and business, and having defrauded and cheated in her said trade, &c., and of and concerning plaintiff, as supposed by defendant, having, by a son of her, plaintiff, as her servant in that \*behalf, used improper and fraudulent weights in her said trade, &c., and defrauded and cheated in her said trade, &c., and of and concerning plaintiff having, as supposed by defendant, in her said trade, &c., fraudulently used two weights to a steelyard by her used in her said trade, &c., and of and concerning plaintiff's having, as supposed by defendant, in her said trade, &c., by a son of her, plaintiff, as her servant in that behalf, fraudulently used two weights to a steelyard by her used in her said trade, &c., and of and concerning himself, the defendant, he, defendant, further contriving and intending as aforesaid, then, in the presence and hearing of the last-mentioned, &c., falsely and maliciously spoke and published, of and concerning plaintiff in her aforesaid trade and business, and of, &c., (repeating verbatim the words above used in describing the subject of the discourse down to "and of and concerning himself, the defendant,") these false, &c., words following, viz. : "You, Mistress Griffiths," (meaning plaintiff,) "have used them for years," (meaning that plaintiff had used improper and fraudulent weights in her said trade, &c., and had defrauded and

cheated in her said trade, &c.;) “and I” (meaning himself, defendant; “have been told so:” And also, in the last-mentioned discourse, in answer to a question then put by plaintiff to defendant as to whether defendant had told and said to one John Green that plaintiff’s son used two balls to plaintiff’s steelyard, those other false, &c., words following, (viz.:) “To be sure I” (meaning himself, defendant) “did” (thereby meaning that he, defendant, had told and said to the said John Green that plaintiff’s son used two balls to plaintiff’s steelyard, and also thereby meaning that plaintiff, by a son of her, plaintiff, as her servant in that \*behalf, had

\*846] used improper and fraudulent weights in her said trade, &c., and cheated and defrauded in her said trade, &c.;) “I” (meaning himself, defendant) “will swear to it in any court; you, Mistress Griffiths,” (meaning plaintiff,) “have used them for years,” (meaning that plaintiff had used improper and fraudulent weights in her said trade, &c., and had defrauded and cheated in her said trade, &c.;) “and I” (meaning himself, defendant) “have been told so:” And also, in the last-mentioned discourse, the false, &c., words following, (viz.:) “To be sure I” (meaning himself, defendant) “did; you, Mistress Griffiths,” (meaning plaintiff,) “have used them for years,” (thereby meaning that plaintiff had used improper and fraudulent weights in her said trade, &c.;) “I have been told so:” And also, in the last-mentioned discourse, the false, &c., words following, (viz.:) “To be sure I did; you, Mistress Griffiths, have used them for years,” (thereby meaning that plaintiff had defrauded and cheated, and had been and was guilty of defrauding and cheating, in her said trade, &c.;) “I” (meaning himself, defendant) “have been told so:” And also, in the last-mentioned discourse, the false, &c., words following, (viz.:) “You” (meaning plaintiff) “have used them for years,” (thereby meaning that plaintiff had used improper and fraudulent weights in her said trade, &c.;) “And also, in the last-mentioned discourse, the false, &c., words following, (viz.:) “You” (meaning plaintiff) “have used them for years,” (thereby meaning that plaintiff had defrauded and cheated in her said trade, &c.;) And also, in the last-mentioned discourse, in answer to a question then put by plaintiff to defendant as to whether defendant had

\*847] told and said to one John Green that \*plaintiff’s son used two balls to plaintiff’s steelyard, these other false, &c., following, (viz.:) “To be sure I” (meaning himself, defendant) “did,” (thereby meaning that he, defendant, had told and said to the said J. G. that plaintiff’s son used two balls to the plaintiff’s steelyard, and also thereby meaning that plaintiff, in her said trade, &c., had, by a son of plaintiff, as her agent and servant in that behalf, fraudulently used two weights to a steelyard by her used in her said trade, &c.;) “I” (meaning himself, defendant) “will swear to it in any court; you, Mistress Griffiths, have used them for years,” (meaning that plaintiff had, in her said trade, &c., fraudulently used two weights to a steelyard by her used in her said trade, &c.;) “and I” (meaning himself, defendant) “have been told so:” And also,

in the last-mentioned discourse, these other false, &c., words following, (viz.:) “To be sure I” (meaning himself, defendant) “did; you, Mistress Griffiths, (meaning plaintiff,) “have used them for years,” (thereby meaning that plaintiff had, in her said trade, &c., fraudulently used two weights to a steelyard by her used in her said trade, &c.); “and I” (meaning himself, defendant) “have been told so:” And also, in the last-mentioned discourse, the false, &c., words following, (viz.:) “You, Mistress Griffiths, have used them for years,” (thereby meaning that plaintiff had, in her said trade, &c., fraudulently used two weights to a steelyard by her used in her said trade, &c.)

General damage, and also special damage from a party, named, ceasing to deal with plaintiff.

Pleas. 1. Not Guilty. Issue thereon. 2. A justification. Replication, De injuriâ. Issue thereon.

On the trial, before Lord DENMAN, C. J., at the \*Hertfordshire Spring Assizes, 1845, a verdict was found for the plaintiff. In [\*848 Easter term, 1845, *M. Chambers* obtained a rule nisi for arresting the judgment(a) on the ground that the declaration was to be considered as containing as many counts as there were separate parts of the discourses set forth, and that some of those counts showed no ground of action, (as in some parts of the second discourse containing the word “them” not properly explained by the innuendo,) whereas the damages were assessed generally.

In last Hilary term,(b)

*Bramwell* showed cause. There are two counts only, one for each discourse, though each count contains more than one charge as to the words uttered in the discourse to which it relates. It is therefore immaterial whether the word “them,” in the second count, can bear the meaning assigned to it by the innuendo, because, without the charges which require that innuendo, the count contains a good cause of action; and, although, in an action of slander, if damages be assessed generally upon several counts, of which one shows no actionable slander, the judgment must be arrested, that principle does not apply to damages assessed upon a single count containing different parts of the same discourse, though some parts set out be actionable and some not; note (1) to *Hambleton v. Vere*, 2 Wms. Saund. 171 d. Further, in the second count \*all [\*849 the charges are connected; they must be understood with reference to each other, all relating to parts of one discourse; and then the meaning of all sufficiently appears. Again, the innuendo may be rejected if the action can be supported without it; *Roberts v. Camden*, 9 East, 93, 95; *Harvey v. French*, 1 C. & M. 11; S. C. 2 Tyrwh. 585; judgment of BAYLEY, J., in *Williams v. Stott*, 1 C. & M. 675, 687; S. C.

(a) The rule was originally granted for a venire de novo, but afterwards, by consent, was drawn up for arresting the judgment. *M. Chambers* also moved for a new trial on the ground of misdirection; but, as to this, the rule was refused; *Griffiths v. Lewis*, 7 Q. B. 61.

(b) February 14th. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

3 Tyrwh. 688, 701 : and the second count here is good without any innuendo as to "them."

*M. Chambers* and *Lydekker*, contra. Even if the declaration contain only two counts, as contended by the plaintiff, both the counts are insufficient. The words charged do not, even with the aid of the colloquium, support any of the innuendoes which allege that the meaning was to impute fraud. The court does not know what a steelyard is ; and two balls might be used on a balance without fraud, as, for instance, if they were of the same weight. The innuendo cannot enlarge the colloquium ; *Hawkes v. Hawkey*, 8 East, 427 ; *Day v. Robinson*, 1 A. & E. 554. [PATTESON, J. In that case there was no colloquium explaining the matter introduced into the innuendo.] Nor here. The introductory averment does not state that the plaintiff had a steelyard ; the colloquium does not directly aver it ; nor could it indeed properly introduce a new fact ; and neither explains what the steelyard was, nor how the use of two balls should be fraudulent. *Goldstein v. Foss*, 6 B. & C. 154,<sup>(a)</sup> shows that, for want of such previous allegations, the innuendoes cannot be supported. But, further, there are several counts relating to the second \*850] "discourse : and the word "them," in the first of these counts, and in others, cannot, by aid either of the introductory averments or of the colloquium, justify the innuendo which imputes to it a slanderous meaning. It is true that the innuendo, if not material, may be rejected : but, without the innuendo, the word "them" can convey no meaning. The rule, as laid down in 1 Starkie on Slander, 391, ed. 2, is that, where words are not actionable without explanation, there should be a statement of the special facts, a statement that the words are spoken of such facts, and then innuendoes added to the words and connecting them with such facts. The present case falls within the description in 1 Chitt. Pl. 420, ed. 7, where "the slander is to be collected from a question and answer, not from the latter only ;" and the rules there given are applicable. The court must be enabled to see, on the record, that there is a slander if the allegations are proved ; *Wright v. Clements*, 3 B. & Ald. 503 ; *Wood v. Brown*, 6 Taunt. 169. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court.

This case comes before us upon a motion to arrest the judgment in an action of slander.

The declaration consists of two counts, in the first of which are the alleged slanderous words (four times repeated literatim,) "Matthew Griffiths uses two balls to his mother's steelyard." And the question is, whether those words mean an honest and harmless use of balls to \*851] the steelyard, as of two balls of the same size, for instance, or whether they impute a fraudulent and dishonest use of balls for the purpose of cheating. Now, in the first place, the plaintiff is averred to be a butcher, and to carry on that trade, and that the words

(a) Judgment affirmed on error, *Goldstein v. Foss*, 4 Bing. 482.

were spoken with intent to impute to the plaintiff the use of false weights, and cheating in her said trade. Then follows a colloquium, stating very fully that the words were spoken of the plaintiff in her trade, and of one Matthew Griffiths, her son and servant, and of her using false weights in that trade. The innuendo is: thereby meaning that the plaintiff, by M. G. her son and servant, used false weights in her said trade, and cheated and defrauded in it. And we have no doubt that this innuendo does not exceed its proper function and office; which is, where the words are susceptible of a harmless but also of an injurious meaning, (as is obviously the case here,) to point to that meaning which is injurious and therefore actionable; and, that being found by the jury, the verdict is right. In the case of *Clegg v. Laffer*, 10 Bing. 250, words which might fairly be understood as being indifferent and harmless, or as imputing dishonesty to the plaintiff, had the latter meaning attributed to them by an innuendo, without any preliminary matter whatever; and the Court of Common Pleas was of opinion that there was no valid objection to that innuendo.

The second count, framed upon *another* discourse, on *another day*, also contains very full and appropriate allegations, and a colloquium, introductory to the statement of the words. The objection to this count is, that some of the words are not actionable, even with the aid of an innuendo; and, further, a doubt was suggested, whether \*the second [\*852 could properly be considered as *one* count, because the words are not stated to have been uttered in one continued sentence, but in separate sentences. But they are stated to have been uttered in *the same* discourse, and, whether there may be a doubt or not as to some being actionable, it is clear that others are. The statement is that, in the said last-mentioned discourse, (the discourse to which the second count is confined,) in answer to a question put by plaintiff to defendant, whether defendant had told to one John Green that plaintiff's son used two balls to her (plaintiff's) steelyard, defendant spoke these words: "I did; I will swear to it;" "you, Mrs. Griffiths, have used them for years." Now it is to be observed (as already noticed) that the words contained in this second count are alleged to have been all spoken in the same discourse, and at the same time: and it ought to have been mentioned that the words "I did," &c., are applied by proper innuendoes to the plaintiff, and to the use of false weights in the way of her trade. And, upon the subject now under consideration, the effect of the words having been uttered in the same discourse, we find the following remarks in note (1) to *Hambleton v. Vere*, 2 Wms. Saund. 171 d, as the result of the cases; which we believe to be correct, and adopt accordingly. It is there observed that "There is another class of cases on this head respecting actions for words; with regard to which it is laid down, that if an action be brought for speaking words *all at one time*, that is, all in one count, and there is a verdict for the plaintiff, though some of the words will not

maintain the action, yet if any of the words will, the damages may be  
 \*853] given entirely; for it shall be intended that the \*damages were  
 given for the words which are actionable, and that the others  
 were inserted only for aggravation." "But if the action be brought for  
 several words spoken *at several times*, and the action will not lie for the  
 words spoken at one time, but will lie for the words spoken at another,  
 and a verdict be found for all the words and entire damages given, it is  
 not good, and judgment will be arrested."

This seems not to differ from the case where, upon a declaration con-  
 taining good and also bad counts, a verdict is found for the plaintiff upon  
 the whole, and general damages are given.

This second count, however, which we consider to be one, and framed  
 upon one discourse, is, for the reasons already assigned, good: and the  
 result is that the rule must be discharged. Rule discharged.(a)

(a) See the preceding and the next case.

\*854] \*ALFRED against FARLOW. *Monday, April 27th.*

Declaration for slander recited that plaintiff carried on the trade of buying and selling, and  
 was a dealer in, an article of fishing tackle called a winch; and that defendant used the  
 trade of making and selling winches: and it charged that defendant, contriving to injure  
 plaintiff in his said trade, and to cause his customers to believe that he was guilty of un-  
 lawfully buying goods well knowing them to have been stolen and dishonestly come by,  
 in a discourse which he had with plaintiff, of and concerning him with reference to his  
 said trade, and of and concerning the premises, in the presence and hearing of J. F., &c.,  
 falsely and maliciously spoke, to and of and concerning plaintiff, and of and concerning  
 him with reference to his said trade and the premises, the words, &c.: "I" (meaning  
 defendant) "have been robbed of about three dozen winches" (meaning such articles,  
 &c.,;) "a person has been buying things at my shop, and has taken them; you" (mean-  
 ing plaintiff) "have bought two, one at 3s., and one at 2s.; you" (meaning plaintiff)  
 "knew well, when you bought them" (meaning the said winches,) "that they cost me"  
 (meaning defendant) "three times as much making as you" (meaning plaintiff) "gave  
 for them, and that they could not have been come honestly by." The declaration then  
 proceeded: "whereupon the plaintiff then, in the presence and hearing of the aforesaid  
 persons, said to the defendant," &c., setting forth further words of plaintiff respecting  
 winches, and alleging that defendant, further contriving, &c., thereupon, in the presence  
 and hearing of the said persons, replied, &c. (setting out other words.) "Thereby mean-  
 ing," &c. "that the plaintiff had been and was guilty of buying winches, well knowing the  
 same to have been dishonestly come by and to have been feloniously stolen by the person  
 of and from whom the said plaintiff had so bought them."

After verdict for general damages: *Held*, on motion in arrest of judgment."

1. That the words first set out imputed that plaintiff had received stolen goods knowing them  
 to have been stolen.
2. That the words following appeared to be spoken at the same time with the others, and  
 formed with them a continued discourse; that the declaration, therefore, contained only  
 a single count; and, consequently, that plaintiff was entitled to judgment, even on the  
 assumption that the words last set out gave no cause of action.

CASE. The declaration, after a prefatory averment of plaintiff's good  
 character, stated that, before and at the time of the committing, &c., plain-  
 tiff used and exercised, followed and carried on, and still doth use, &c.,  
 the trade and business of buying and selling, and then was a dealer in,



fishing tackle, and (amongst other things) a certain article of fishing tackle called a winch: and hath always conducted himself, in and with reference to his said trade, &c., with integrity, &c., and hath never been guilty, &c., nor, till the committing, been suspected to have been guilty, of dishonesty, or of fraudulent or improper conduct, or of buying or receiving stolen goods then knowing them to have been stolen or dishonestly come by, or of any such misconduct, &c., \*hereinafter stated to have been charged upon him by defendant; by means of which [\*855 premises plaintiff, until the speaking, &c., was deservedly held in credit, &c., and particularly by those with whom he had any dealings in the way of his said trade and business and dealing; and enjoyed reputation, &c., and acquired profits, &c., in his said trade and business. That defendant, before and at the time of committing, &c., used, &c., the trade and business of making and selling winches and other fishing tackle. Yet defendant, well knowing, &c., but contriving and wrongfully intending not only to bring plaintiff into scandal, &c., but to injure and destroy his good name and fame, and credit in his said trade and business, and to ruin and destroy the same, and cause his customers and employers therein to leave him, and cease to have any dealings with him, and to cause them to believe that he had been, and was, guilty of unlawfully buying goods well knowing the same to have been stolen and dishonestly come by, and wrongfully and maliciously to expose and subject him to the penalties and punishment by law made against, and inflicted upon, persons in such case offending, heretofore, to wit, on, &c., in a certain discourse which defendant then had with plaintiff of and concerning him with reference and in relation to his said trade and business, and of and concerning the premises, in the presence and hearing of J. F. and S. M. B., and divers other persons, then, in the presence and hearing of J. F. and S. M. B., and the said other, &c., falsely and maliciously spoke and published, of and concerning plaintiff, and of and concerning him with reference and relating to his said trade and business and premises, the false, &c., words following; that is to say: "I" \*(meaning the said defendant) "have been robbed of about three dozen of [\*856 winches" (meaning such articles of fishing tackle as aforesaid); "a person has been buying things at my shop, and has taken them" (meaning the said winches); "you" (meaning the said plaintiff) "have bought some of them; you" (meaning the said plaintiff) "have bought two, one at 3s. and one at 2s. You" (meaning the said plaintiff) "knew well, when you bought them," (meaning the said winches,) "that they cost me" (meaning the said defendant) "three times as much making as you" (meaning the said plaintiff) "gave for them, and that they could not have been come honestly by." Whereupon plaintiff then, in the presence and hearing of the aforesaid persons, said to defendant: "I have bought half a dozen winches from a new maker, the week before;" and then, in the presence and hearing of the persons aforesaid, produced and showed

some of such last-mentioned winches to defendant; who, further contriving, and falsely and maliciously intending as aforesaid, thereupon, in the presence and hearing of the said persons, falsely, &c., replied to plaintiff in the false, &c., terms following; that is to say: "Oh no: these" (meaning the winches so produced and shown by the said plaintiff to the said defendant as last aforesaid) "are not my winches; you" (meaning the said plaintiff) "know that well enough; these" (the said defendant meaning and pointing to certain other winches of the said plaintiff then lying and being in the shop, and in the presence of the persons aforesaid) "are mine. I" (meaning the said defendant) "am sorry to say any thing against any tradesman, but will bring the man who stole my winches, and let you" (meaning the said plaintiff) "see him; for he  
 \*857] is in my" (meaning the said defendant's) "custody." Thereby meaning and insinuating, and wishing and causing and procuring it to be believed, that the plaintiff had been and was guilty of buying winches, well knowing the same to have been dishonestly come by, and to have been feloniously stolen by the person of and from whom the said plaintiff had so bought them. Averment of damage to plaintiff in his reputation and trade, and that divers, &c. (not named) refused to have dealings with him; and of loss thereby in his said trade and business.

On the trial, before Lord DENMAN, C. J., at the London sittings after Hilary term, 1845, a verdict was found for the plaintiff with general damages. In Easter term, 1845, *Jervis* obtained a rule nisi for arresting the judgment.(a)

In last Hilary vacation,(b)

*W. H. Watson* and *Warren* showed cause. The first part of the words used contains an imputation of receiving stolen property with knowledge that it was stolen. The words are susceptible of that meaning; the concluding innuendo attributes it; and the jury by their verdict have affirmed the truth of the innuendo. That imputation constitutes slander, without reference to the trade of the plaintiff. If so, it is not essential to the right of action that the slander should affect the character of the plaintiff as a tradesman, though it is laid as spoken of him in that character; *Harwood*  
 \*858] *v. Astley*, 1 New R. 47. Words much less direct were held to be slanderous, even without an introductory averment, in *Clegg v. Laffer*, 10 Bing. 250. In *Roberts v. Camden*, 9 East, 93, 96, Lord ELLENBOROUGH, delivering the judgment of the court, said: "The rule which at one time prevailed, that words are to be understood in mitiori sensu, has been long ago superseded; and words are now construed by courts, as they always ought to have been, in the plain and popular sense in which the rest of the world naturally understand them." That is, substantially, the rule laid down to the jury by KING, C. J., in *Rex v. Matthews*, 15 How. St. Tr. 1323, 1391, where the prisoner was convicted of

(a) Or for a new trial; but this was not pressed.

(b) February 14th, 1846. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, J.

treason, under stat. 6 Ann. c. 7, s. 1, for maliciously and advisedly, by printing, maintaining and affirming the title of the Pretender to the Crown. The intention, if properly laid, must, after verdict, be presumed to be proved, as PARKE, B., said in *Sweetapple v. Jesse*, 5 B. & Ad. 27, 31, 32, though there the words, in the sense alleged, conveyed no imputation of crime. But, further, even if these words were not actionable per se, they are so when spoken of a person in his trade. To say of a tradesman, in his trade, that he is dishonest, is clearly actionable. It appears, from instances collected in Com. Dig. *Action upon the Case for Defamation*, (D 25,) that words may be slanderous, as spoken of a man in his trade, though not connected with any specific act of trading. *Jones v. Littler*, 7 M. & W. 423, is such an instance; and so is *Stanton v. Smith*, 2 Ld. Raym. 1480, there cited. The case here is not like that of *Ayre v. Craven*, 2 A. & E. 2, where the declaration alleged that plaintiff was a physician, and that the defendant said of him, in his profession, that he had \*com-  
mitted adultery; and, after verdict, judgment was arrested, because [\*859  
“the declaration ought not merely to state that such scandalous conduct was imputed to the plaintiff in his profession, but also to set forth in what manner it was connected by the speaker with that profession.” Here that appears; and the case falls within the rule laid down by DE GREY, C. J., in *Onslow v. Horne*, 3 Wils. 177, 186, that “words are actionable when spoken of one in an office of profit, which may probably occasion the loss of his office, or when spoken of persons touching their respective professions, trades and business, and do or may probably tend to their damage.” It will, however, be contended that the words which are set forth in the later part of the declaration are not slanderous. But that is unimportant, because they occur in the same count with words which are slanderous, and appear to have been spoken in the same discourse. Further, the last words do, as explained by the innuendo, and in their ordinary sense, convey a slanderous meaning. And, by the words themselves, it appears that they are spoken avowedly of the plaintiff in his character of a tradesman, so that an averment to that effect is not needed.(a)

*Jerris* and *Bramwell*, contra. If the words are not shown, by averments and innuendoes properly framed, to be slanderous, the finding of the jury will not aid. Now, as to the words last charged, there is no averment explaining what “certain other winches” means; and it is not said concerning what matter the defendant “replied.” The subject-matter is only introduced by \*innuendo, which cannot be done; *Goldstein* [\*860  
*v. Foss*, 6 B. & C. 154 ;(b) *Day v. Robinson*, 1 A. & E. 554. These words cannot be explained by the introductory averments which relate to the words first charged, because it does not appear that the whole formed one connected conversation; indeed the contrary appears, inasmuch as it is clear that some time had intervened between the different

(a) See *Carr v. Osgood*, 1 Lev. 280; *Reeve v. Holgate*, 2 Lev. 62.

(b) Affirmed, on error, in Exch. Ch., *Goldstein v. Foss*, 4 Bing. 489.

utterings, the last being introduced by a fresh averment as to the parties present. Then, even as to the words first charged: how can it be said that they impute a crime to the plaintiff, or any misconduct in his trade? In *Heming v. Power*, 10 M. & W. 564, 570, the ground on which it was held that the action lay was that "the words import a charge of felony, and must be taken so to have been understood by those who heard them." But, to assert that the plaintiff purchased goods which he knew not to "have been come honestly by," is not to impute felony: there could be no felony unless the goods had been stolen, which is not alleged. The words spoken are consistent with the supposition that the defendant had been cheated of the goods, or had sold them on credit and not been paid for them, and, in that sense, complained that he had been robbed of them. The meaning, therefore, which is charged at the end of the declaration, that the plaintiff had bought winches which he knew to have been feloniously stolen, is not proved. Would a plea that the plaintiff did know that the goods were not come honestly by show a justification? Then, as to the trading, no connection whatever is shown between the act of purchasing these winches and the trade of \*buying and selling winches, \*861] for such buying and selling would not be prejudiced by the plaintiff's purchasing winches dishonestly come by; and therefore this ground of action fails, on the principle affirmed in *Ayre v. Craven*, 2 A. & E. 2; *Brayne v. Cooper*, 5 M. & W. 249; and *Alexander v. Angle*, 1 C. & J. 143; S. C., 1 Tyrwh. 9. [Lord DENMAN, C. J. referred to *Hearne v. Stowell*, 12 A. & E. 719.] That case shows that, even after verdict, it is not enough that the words may possibly, either in themselves or with reference to the plaintiff's calling, have a slanderous meaning: the declaration must point the meaning by proper averments.

*Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court.

This also was a motion to arrest the judgment in an action of slander: and the question in this case is, (as in the case just disposed of (a) it was,) whether the words stated in the declaration may be considered as having been spoken at one and the same time, and as one continued discourse, or whether they are, from their nature and the manner in which they are stated, necessarily severable. If so, it was contended that the latter part of the words, not being introduced by any prefatory matter or colloquium, are not actionable, and therefore that, damages having been given upon the whole declaration, the judgment ought to be arrested, upon the same principle that, where damages are given upon the whole declaration containing both good and bad counts, such must be the result. It becomes, \*862] therefore, material \*to ascertain whether the declaration in this case does, in truth, consist of one or more counts.

We certainly find that, in an action for a libel, *Hughes v. Rees*, 4 M. & W. 204, where the declaration set out several publications of *different*

(a) *Griffiths v. Lewis*, ante, p. 841.

*dates*, each publication was considered by the Court of Exchequer to be a distinct count. In that case, as in this, there were the words "further contriving and intending," which are usually found at the commencement of a fresh count; but, in the case cited, the different dates of the alleged libels were adverted to by Lord ABINGER, as being material, which, in the case last decided, (a) we have shown them to be; whereas in this the whole is described as one discourse of defendant with plaintiff, in the presence of two witnesses, (naming them;) and the same is continued in the presence of the same witnesses, with the interruption only of a remark by plaintiff, to which the defendant, as a part of the same conversation, replies. The words "further contriving, and falsely and maliciously intending," occurring as they do when the defendant resumes the discourse after the plaintiff's interruption, by no means constitute what follows a fresh count. Supposing therefore (which may perhaps be doubted) that the latter part of the words need some explanation in the shape of averment or colloquium, (which was the objection urged on behalf of the defendant,) it only amounts to this, that part of the words attributed to the defendant are not actionable. But the earlier part of the alleged slander plainly imputes to the plaintiff having received stolen goods ("winches," a part of fishing tackle,) knowing them to have been stolen: and therefore upon the words \*making that imputation the verdict may well be sustained, though [ \*863 there may be (if, indeed, such there be) other parts which do not impute any offence, and are therefore not actionable.

We think therefore that, as the words appear, upon the face of the declaration, to have been spoken at one time, the whole may be considered as one count, containing words both actionable and not, and that the verdict may well stand upon those which are actionable.

Rule discharged.(b)

(a) *Griffiths v. Lewis*, ante p. 841.

(b) See the two preceding cases.

## BARBER, COLE and CRUMP against BUTCHER. *Tuesday, April 28th.*

Defendant, to secure a debt owing from him to plaintiffs, assigned to them a policy of insurance on his life, and covenanted by the deed of assignment that he would pay the annual premium, stated to be 37*l.* 15*s.*, and that, if he at any time made default, the plaintiffs might pay it and recover the amount in an action at law as for money paid to his use. Plaintiffs declared against defendant in debt, reciting the deed and alleging payment by them of a premium on default made by defendant, whereby an action had accrued to plaintiffs, &c.

*Held*, on special demurrer, that the count was good, though the deed contained no express covenant that the defendant should, in any stated event, pay the amount of the premium to the plaintiffs.

DEBT. The first count of the declaration stated that, by indenture, made, February 27th, 1841, between defendant of the one part, and plaintiffs of the other part, (profert,) reciting that, by a policy of insurance

bearing date July 3d, 1839, and numbered, &c., the society for equitable assurance on lives, &c., called The Caledonian Insurance Company, &c., (stating their places of business,) assured to defendant the sum of 999l. 19s., to be paid to his executors, administrators or assigns after his decease, at the annual premium of 37l. 15s.: that defendant was indebted to the plaintiffs, Barber and Cole, in the sum of 1449l. 12s. and to the plaintiff Crump in 1008l. 14s.: that the said parties had agreed, on receiving a sum equal to 10s. in the pound on their respective debts, to be

\*864] paid at intervals (commencing, \*&c.,) and secured by the guarantee of one William Taylor Smith, to release defendant from all personal liabilities in his lifetime in respect of the remaining 10s. in the pound, on his assigning over to them, the plaintiffs, the policy of assurance in this indenture before mentioned, as a security for the repayment to them (so far as the amount payable under such policy might extend,) of such portion of the remaining 10s. in the pound on their respective debts as might not have been voluntarily paid by defendant in his lifetime, he, defendant, agreeing to keep the said policy valid and subsisting during his lifetime: and that the said W. T. Smith had given his guarantee for payment of the first mentioned 10s. in the pound, &c.: it was witnessed that in pursuance of the said agreement, and in consideration of defendant being discharged from all personal liability in his lifetime in respect of the 10s. in the pound that should remain due to plaintiffs after payment to them of 10s. in the pound on their respective debts in the manner, &c., before mentioned, he, defendant, had bargained, sold, assigned, transferred and set over to plaintiffs, their executors, administrators or assigns, the said policy of assurance thereinbefore recited, and the said sum of 999l. 19s. assured thereby, and all other moneys, benefits, &c., under or by virtue of the said policy, and full power, &c., to ask, demand, sue for, recover and give acquittances for, the said 999l. 19s. and other moneys, and all the right, title, &c., at law and in equity, of defendant, in, to, out of or upon the said policy, moneys and premises thereby assigned: habendum to plaintiffs upon trust to pay ratably out of the moneys received under such policy, and so far as the same would extend, the balance that should

\*865] then be remaining due from \*defendant to plaintiffs of the debts then due from him to them respectively as in this indenture before mentioned; and, after payment of such balance, to pay the surplus, if any, to the executors, administrators or further assigns of defendant: And defendant did thereby, for himself, his heirs, executors, and administrators, covenant and agree with plaintiffs, their executors, &c., that he would, during the continuance of that security, from time to time, pay or cause to be paid to the said Caledonian Society the said annual premium of 37l. 15s., and any other moneys which should be required for keeping the said policy on foot, when and as the same should become due and payable in respect of the said policy, and also would from time to time deliver to plaintiffs the receipts for the premium or moneys so paid: “and that, if



the defendant should at any time or times refuse or neglect to pay the said annual premium, or to deliver the said receipts for the payment thereof within seven days after the 5th day of June in every year, on which day in every year the said annual premium would from time to time become due, it should be lawful for the plaintiffs or either of their executors, &c., "to pay the said annual premium, and all other moneys which might be required for keeping the said policy on foot, and sue and recover the same from the defendant in an action at law as for money paid by them, or either of them, to and for the use of the defendant and at his request, with interest" at 5 per cent.: As by the said indenture, &c. Averment that, after the making of the said indenture, and during the continuance of the said security and of the said policy, to wit, on, &c., one annual premium, amounting to 37*l.* 15*s.*, upon and in respect of the said policy, became due and payable to the said 'Caledonian Society for keeping the said policy on foot; and that defendant [\*866 having refused and neglected to pay the same premium, or to deliver any receipt for the payment thereof within seven days after the said 5th June, plaintiffs afterwards, and after the expiration of the said seven days, to wit, on, &c., paid the said annual premium, amounting as aforesaid, to the said Caledonian Society, for the purpose of keeping on foot the said policy, the said payment being then necessary and required for that purpose. By reason whereof, and of defendant not having repaid the said money to the plaintiffs, an action hath accrued to plaintiffs to demand and have of and from defendant the said sum of 37*l.* 15*s.*, parcel, &c.

After oyer of the indenture, (which contained no material clause except those above stated,) the defendant demurred, assigning numerous causes: the material ones will appear sufficiently by the argument. The plaintiffs joined in demurrer.

*Petersdorff*, for the defendant. The undertaking on which this action is grounded not being a covenant to pay money to the plaintiffs, they cannot maintain debt upon it. They should have sued in covenant upon the clause covenanting for payment of the premium; or have framed their action upon the clause enabling them to sue as for money paid. [Lord DENMAN, C. J. Is not this a count for money paid, in a round-about form? Without any express stipulation, would not the money advanced under these circumstances have been money paid to the defendant's use, he having given the plaintiffs authority to pay it on his default?] The covenant is to pay the insurance office. Where the thing to be done \*is, in effect, not a payment to the plaintiff, but a collateral act, [\*867 as the case is here, debt does not lie; *Randall v. Rigby*, 4 M. & W. 130; *Harrison v. Matthews*, 10 M. & W. 768: and parties cannot, by arrangement between themselves, give a different form of action from that which the law recognises; *Ker v. Osborne*, 9 East, 378, 381; *Marshall v. Hopkins*, 15 East, 309, 314.

*Crompton*, contra. The plaintiffs do not proceed upon the covenant to

pay third persons. Whenever, by covenant, a party is to pay the plaintiff money in a certain event, debt lies: and here the amount of premium was a sum certain, (or ascertainable with certainty,) to be paid by defendant to plaintiffs in a specified event. The plaintiffs could not recover in assumpsit, the engagement being by deed. Debt, therefore, is the proper remedy; and the plaintiffs were not obliged to declare in covenant; *Hooper v. Shepherd*, 2 Stra. 1089. It was necessary, in declaring, to show the collateral matter; but the substantial ground of the action is the undertaking to pay in a certain event, which event has happened. The uncertainty, in the first instance, how much might become due, is no objection; *Ingledew v. Cripps*, 2 Ld. Ray. 814. [Lord DENMAN, C. J., mentioned *Yates v. Aston*, 4 Q. B. 182.] There the plaintiff had paid money to one Blagg for the defendant, and had taken, as security, an assignment of a mortgage previously given by defendant to trustees for Blagg; the mortgage deed and deed of assignment contained no covenant by the defendant to pay; and it was held that the plaintiff might sue \*868] the defendant in debt on \*the common indebitatus counts. Where the mortgage or other deed shows an obligation to pay, debt lies, though there be no formal undertaking to pay; Com. Dig. *Debt*, (A 4.) Here, the defendant does, in effect, agree to pay in a particular event, for it is provided that the plaintiffs, if obliged to pay the premium, shall recover it from him again. In *Randall v. Rigby*, 4 M. & W. 130, the action was on a mere collateral covenant to secure the payment of an annuity issuing out of land; and on that ground the Court of Exchequer held that the proceeding was misconceived. But in *Evans v. Jones*, 5 M. & W. 295, where premises were mortgaged to secure a debt, and the defendants, for more effectually securing it, covenanted to the mortgagee by the same indenture to pay him the sum on a certain day, and it was pleaded that they undertook only as sureties for the mortgagor, the defendants' counsel argued, without success, that this was a merely collateral engagement upon which debt would not lie, but covenant only. Lord ABINGER said: "It is a covenant to pay a sum certain on a particular day: if payment be not made on that day, it becomes a debt:" and the court gave judgment for the plaintiff on that ground, distinguishing the case from *Randall v. Rigby*. And, in *Harrison v. Matthews*, PARKE, B., citing *Evans v. Jones*, said: "It is well settled, that if there be a covenant by the defendant that he will certainly pay a sum certain, debt will lie; and that it will, although the same sum is by the same deed secured by a mortgage." On the other hand, (as the same learned judge points out,) if, in the first instance, it is not the defendant's duty, but that of \*869] some other person, to pay, the \*undertaking is collateral. But, if the defendant is liable in the first instance, it makes no difference that some contemplated event is to happen before the liability can attach; nor is it material even that the debt is another's, where the duty of paying rests primarily on the defendant. If this were a case of sim-

ple contract, an action for money paid would clearly lie under the circumstances: then, for the reasons already given, debt lies, the contract being under seal.

*Petersdorff*, in reply. The plaintiffs, having chosen to proceed, not for money paid, but on the contract under seal, were bound to rely upon its express obligation; they could not pass that over and resort to an implied one: and there is no express covenant that the defendant shall repay any premium to the plaintiffs. It is true that, in the case of mortgagee and mortgagor, the plaintiff may proceed upon the obligation created by the mortgage, treating the mortgage deed as inducement: but there the action rests upon the privity of contract between the mortgagee and the mortgagor. In *Evans v. Jones*, 5 M. & W. 295, the defendant had joined in an absolute covenant to pay the debt sued for. In the present case, if debt lies, tender ought to be an answer; but no tender could have been made to the plaintiffs, under this indenture, which could exonerate the defendant; and a recovery by the plaintiffs in this action would be no defence to an action of covenant on the indenture.

LORD DENMAN, C. J. There is no doubt that this action is maintainable. The deed is set out, showing the intention of the parties that the defendant shall pay \*certain sums of money for the benefit of the plaintiffs; and that, if he makes default, so that the plaintiffs [\*870 have to pay, the sums shall be recoverable from him as money paid by them to his use. Clearly those payments may be recovered in an action of debt.

WILLIAMS, J.(a) I am of the same opinion. The sums recoverable are sufficiently certain; for both parties know the amount payable from time to time for premiums, and *certum est quod certum reddi potest*.

COLERIDGE, J. No difficulty can be raised here, unless by confusing the facts. A policy of insurance is assigned as security, with a covenant by the assignor that he will pay the premiums to the insurance company, and that, if he does not, it shall be lawful for the assignees to pay them, and recover the amount from the assignor as money paid to his use. Mr. *Petersdorff* contends that in this instrument a direct covenant appears, which the plaintiffs cannot pass by in order to seek their remedy in another way. But, according to this argument, the policy might be forfeited by the defendant's omission, and no remedy obtainable on the deed. That is not so. The deed authorizes the plaintiffs to pay premiums on the defendant's behalf. A sum paid on the defendant's behalf, by his authority, is money paid to his use. It turns out that the payment is made by virtue of a deed containing a certain covenant; and the only question is whether, that being the case, debt will lie. I see no difficulty in the point.

Judgment for plaintiffs.

(a) Patteson, J., was absent.

**\*871] \*The QUEEN against The Inhabitants of ASHBURTON.***Wednesday, April 29th.*

An indenture for binding a parish apprentice purported to be "in execution of an order under the hands of G. B. and R. P.," justices "acting in and for the hundred of Teignbridge within the county of Devon." On the back of the indenture was the order for binding, purporting to be made by "G. B. and R. P.," "justices of the peace acting in and for the said county." (Devon). At the foot of the indenture followed an allowance in the words, "We whose names are hereunder written, *justices of the peace*, (whereof one is of the quorum,) do consent to allow," &c., "G. B. R. P." The order and indenture were both dated on the same day. *Held* that, although the allowance did not contain the words "justices of the peace acting in and for the county of Devon," yet it sufficiently appeared from the whole of the documents that the allowing justices were such, and were the same who made the order for binding.

In stat. 56 G. 3, c. 139, s. 1, the words "such justices shall sign the allowance of such indenture" mean the same justices who made the order for binding.

On appeal against an order for the removal of John Waldron from Manaton to Ashburton, both in the county of Devon, the sessions confirmed the order, subject to the opinion of this court on the following case.

The respondents on the trial of the appeal relied upon a settlement by apprenticeship in the appellant parish. In support of this settlement they put in evidence the following documents.

"Devon, to wit. To the churchwardens and overseers of the poor of the parish of Manaton in the said county. Whereas, by a certain act of parliament," &c., (56 G. 3, c. 139,) "it is enacted that, from and after the 1st day of October, 1816, all poor children before they are bound shall be of the full age of nine years, and an order for such binding must be first obtained by the churchwardens and overseers of every parish from two magistrates acting in and for the county or district wherein such parish shall be situated; and whereas the churchwardens and overseers of the poor of the parish of Manaton have this day brought before us, Gilbert Burrington, clerk, and Robert Palk, Esq., two of his majesty's  
**\*872]** justices of the peace acting in and for the \*said county, a poor child, hereinunder named, of the said parish, to be bound out a parish apprentice; we, therefore, the said justices, after having fully examined into the circumstances and fitness of the master and the age of the said child, do allow the same: and we do hereby order and direct you the said churchwardens and overseers of the poor of the parish of Manaton forthwith to prepare one pair of indentures, and cause the same to be brought before us the said justices for the purpose of binding the said child an apprentice to the intended master thereof according to the said act. Given under our hands this 29th day of February, 1820.

"G. BURRINGTON. R. PALK."

Name of Apprentice.	Age.	Name of Master.	Residence.	Occupation.
John Waldron.	12	Stephen Yolland.	Ashburton.	Yeoman.

"This indenture, made the 29th day of February in the first year," &c., and A. D. 1820, "Witnesseth that, in pursuance and in execution of an

order under the hands of Gilbert Burrington, clerk, and Robert Palk, Esq., two of his majesty's justices of the peace acting in and for the hundred of Teignbridge within the county of Devon, bearing date the 29th day of February instant, made according to the provisions of an act," &c., (56 G. 3, c. 139,) "Robert Nosworthy and John Nosworthy of Tor Hill, churchwardens of the parish of Manaton in the county of Devon, and William Nosworthy, Daniel Mudge, and John Wills, overseers of the poor of the said parish, have put and placed, and by these presents do put and place, John Waldron, aged twelve years and upwards, a poor child of the said parish, apprentice to Stephen Yolland of Ashburton in the said county, yeoman." (The case then set out the rest of the indenture, which was in the usual form.) "In witness whereof the parties above [\*873 said to these present indentures interchangeably have set their hands and seals the day and year above written.

"We, whose names are hereunder written, justices of the peace, (whereof one is of the quorum,) do consent to allow the putting forth of John Waldron an apprentice according to the intent and meaning of this indenture.

"GILBERT BURRINGTON.

"ROBERT PALK."

"Sealed and delivered in the presence of John Wills."

The order is printed on the back of the indenture; and the allowance appears at the foot of the indenture.

The respondents proved service under the indenture, and residence in the appellant parish.

The appellants objected that it did not sufficiently appear on the face of the above documents that the parties who signed the allowance had legally jurisdiction so to do; because it did not appear in the said allowance that Gilbert Burrington and Robert Palk were justices of the peace for the county of Devon. The sessions held that the jurisdiction to allow sufficiently appeared on the face of the said documents, and confirmed the order of removal: and they further found from the evidence, including the said allowance, that in fact the said G. Burrington and R. Palk were, at the time they signed the said allowance, justices of the peace for the county of Devon, and that they were the same justices who signed the said order for binding.

Should this court be of opinion that the sessions were right in this decision, the order of sessions was to be \*confirmed. Should [\*874 that decision be held incorrect, the order of sessions and order of removal were to be quashed.

*J. Greenwood* and *Merivale*, in support of the order of sessions. The objection is wrongly taken. The act does not require that the allowing justices shall be justices of the peace for the county in which the pauper is bound, but that they shall be the same justices who ordered the binding. They might be justices of the county, and yet not the same who

ordered the binding, and consequently without jurisdiction. But, in point of fact, although the allowance omits to mention the county of Devon, yet the omission is supplied if the documents are regarded as one connected whole. The order for the binding purports to be made by Gilbert Burrington and Robert Palk, justices in and for the county of Devon. Then the indenture, on the same parchment, purports to be in pursuance of the order of the same justices: and at the foot of the indenture follows the allowance signed by them. And that the documents may be then regarded together for the purpose of inferring jurisdiction, appears from *Rex v. Countesthorpe*, 2 B. & Ad. 487, and *Rex v. Hinckley*, 1 B. & Ald. 273.

*Rowe*, contra. If the identity of the justices could be sufficiently inferred by mere reference from the allowance to the body of the indenture, without any words of reference at all, it would not even be necessary for them to describe themselves as justices. But such reference is inadmissible; *Regina v. How*, 11 A. & E. 159; *Regina v. Shipston upon Stour*, \*875] 6 Q. B. 119: and the allowance must be considered \*as an independent instrument. If so, the jurisdiction does not appear. Nor is the objection wrongly taken. In the first place the act does not appear to require that the justices who allow shall be *the same* who order the binding; the words are "such justices," which may only mean justices of the same description, justices for the same county; in which case it is plain that, to have jurisdiction, the allowing justices must appear to be of that county. But at all events the case is drawn up in terms sufficiently wide to allow the court to go into the main question; which is, in substance, whether it appears that the allowing justices had jurisdiction. [WIGHTMAN, J. They appear to have allowed on the same day on which the order was made, and the indenture executed: now, by stat. 56 G. 3, c. 139, s. 1, "after such order shall have been made, such justices shall sign their allowance of such indenture of apprenticeship, before the same shall be executed by any of the other parties thereto."] That is, presuming them to have acted rightly. But in *Regina v. Stockton*, 7 Q. B. 520, a similar line of argument was unsuccessfully used to show that a complaint was made within the county.

Lord DENMAN, C. J. The order and allowance of an indenture for binding a pauper are judicial acts of importance, and must appear to have been done in a regular manner. And I have entertained some doubts whether, in the present case, the jurisdiction of the allowing justices sufficiently appeared. But, taking the whole of the documents together, I think it may be inferred; although the court would carefully avoid encouraging any laxity in these proceedings.

\*876] \*PATTESON, J. If this allowance were of necessity to be regarded as a substantive and independent instrument, I think the jurisdiction would not sufficiently appear: but taking it in connection with the other documents, I think it does. We can fairly use the maxim,



“*Omnia præsumentur ritè acta*,” to raise the presumption that the allowance was made before the execution of the indenture, being dated on the same day. Here, then, are persons, calling themselves justices, who sign their names to an allowance at the foot of an indenture afterwards executed, in which indenture persons of the same names are referred to as justices of the county. I think the conclusion may be safely arrived at, that they are the same justices. As to the question on the construction of the statute, I have no doubt the word “such,” in sect. 1, means “the same.”

WILLIAMS, J. I have also no doubt that the allowing justices must be the same who make the order. As to the main question, I am not without fear that we may be intrenching on the ground established by authority, that every thing necessary to give jurisdiction must appear. Still I think, for the reasons assigned by the rest of the court, enough does appear by fair intendment.

WIGHTMAN, J. The act provides that the order for binding shall be referred to in the indenture by its date, and by the *names* of the justices. That is done here. And then the allowance, signed, presumably, before the execution of the indenture, has the same names appended to it. I think this is sufficient ground for inferring that they were the same justices.

Order of sessions confirmed.(a)

(a) Reported by H. Merivale, Esq.

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\*The QUEEN against The Inhabitants of KEIGHLEY. [\*877  
Wednesday, April 29th.

Respondents in an appeal against an order of removal sent to appellants, with the copy of their order and notice of chargeability, a copy of an indenture of apprenticeship, (under which the alleged settlement was gained,) together with the examination of a witness who stated: “I produce a covenant indenture of apprenticeship,” &c. (describing it.) “The indenture is duly stamped.”

Held that, the stamp being no part of the indenture, it was not necessary to send any “copy” of it; and that the statement and indenture taken together conveyed sufficient information to the appellants, and showed that the removing justices had evidence of a settlement.”

Semble, that it was not necessary to send any statement respecting the stamp at all.

On appeal against an order of justices removing Ann Hird, widow, and her two children, from the township of Idle to the parish, township or place of Keighley, both in the West Riding of Yorkshire, the sessions confirmed the order, subject to the opinion of this court on the following case.

The settlement of the paupers named in the order depends entirely upon the settlement of Thomas Hird; and the examinations whereon the said order was made, so far as the same are now material, are as follows.

“I produce a covenant indenture of apprenticeship, bearing date the 20th day of June, 1830, made between Thomas Hird, therein described as Thomas Hird of the age of 15 years and 5 weeks, son of settled inhabit-

ants of the township of Baildon, of the one part, and Joseph Lapisb, therein described as Joseph Lapisb of Bingley, stone mason, of the other part, by which the said T. H. was bound to serve the said J. L. as his apprentice for the term of 4 years and 10 months, to learn the art or mystery of a stone-mason. The indenture is duly stamped. A premium or apprentice fee of 6*l.* is stated in the said indenture to be paid with the said apprentice, by order of Charles Walker, (a trustee of Christopher Topham deceased,) out of the charity of the above said Mr. \*Topham, \*878] left by his will to put out children apprentices out of the township of Baildon. I received the indenture from Mr. Scholefield of Baildon aforesaid, Mr. Walker's agent."

The grounds of appeal, so far as the same are now material, are as follows:

(The first ground stated was omission to send notice of chargeability and copies of the order and examinations: the case then stated the grounds following.) "That a certain document sent to us by you as and for a copy of the said examinations is defective on the face of it, inasmuch as it does not show the stamp impressed, or the amount of stamp duties paid, upon a certain indenture of apprenticeship given in evidence before the justices who made the said order as part of the said examinations, and in the said examinations described as being duly stamped. That" "the evidence set forth in the only documents sent" "as copies of the said order and examinations" "fails to show that the said Thomas Hird ever acquired any such settlement as in the said examinations mentioned, inasmuch as they altogether fail to show by legal proof whether any premium or consideration, and, if any, what premium," &c., "was given, paid, contracted or agreed for, with or in relation to the said supposed apprentice, nor by whom nor at what time, nor whether the full sum or sums of money received or in anywise directly or indirectly given," &c. "during the term of the said supposed apprenticeship with or in relation to the said supposed apprentice is or are truly inserted," &c. "in some indenture or other writing containing the covenants," &c. "relating to the service of such apprentice; nor whether, at the time the said indenture was received in \*879] evidence, \*any stamp was impressed thereon with respect to the stamp duty payable for any such premium or consideration, or whether any such stamp which was impressed," &c. "was sufficient in amount, or impressed at a proper time, to cause the said supposed indenture to be binding on the supposed apprentice; nor whether any deed stamp was at any time impressed on the said supposed indenture; nor what is the denomination or amount of the stamp or stamps supposed to be impressed on the said indenture; nor from what fact or facts or in what manner the conclusion of law in the said examinations contained, that the said indenture is duly stamped, is or ought to be drawn."

A copy of the indenture, which was annexed to and was to be considered as part of the case, was sent by the respondents to the appellants

as part of the examinations; but such copy did not in any manner show whether any or what stamp was impressed upon the indenture. And the examinations contained no statement or evidence as to premiums or consideration, or stamp, except that before set forth. At the trial, the objections were argued and overruled, subject to the opinion of this court as to their validity. If the court should be of opinion that the objections or any of them ought to have prevailed, the orders of sessions and of removal were to be quashed: otherwise to be confirmed.

*Pashley and Overend*, in support of the order of sessions. The stamp is no part of the indenture; and all that is necessary to be sent is a copy of the examination, of which the indenture forms a part. It cannot therefore be contended that the respondents have not performed the requisites of stat. 4 & 5 W. 4, c. 76, s. 79, \*as to sending a copy of the examination. And the statement that the indenture was "duly stamped" is sufficient for the other purpose alleged in the ground of appeal not to have been fulfilled, namely, showing that a settlement could be obtained under it, and that it was rightly received in evidence before the removing justices. In *Rex v. East Knoyle*, Burr. S. C. 151; S. C. 2 Bott, 481, pl. 598, where the sessions stated in the case that it did not appear that certain indentures (received in evidence) were stamped, it was held that they were rightly received, inasmuch as it did not appear that they were *not* stamped. [\*880]

*Hall and J. T. Ingham*, contra. This indenture came within the requisitions of stat. 8 Ann. c. 9, s. 32; *Rex v. Church Hulme*, 5 B. & Ad. 1029, note (a): and therefore it must have been stamped (in order to be admissible in evidence) within the time required by that statute, namely within six months of the date; otherwise no settlement was gained. And therefore, inasmuch as the examinations must disclose settlement, it was necessary that this fact should appear. [PARTESON, J. In *Rex v. Church Hulme*, the negative was shown, namely that the indenture was not stamped within the proper time. How could the affirmative appear on the examinations?] A strong presumption in favour of it would be afforded by the date impressed on the stamp; and therefore that, at all events, should have been given. So should the amount of the stamp: for, whether that amount be sufficient or not within the acts, is a conclusion of law, not a statement of fact. And the words "duly stamped" will not help the deficiency; for they are a statement of a legal conclusion, \*like the word "chargeable" in *Regina v. High Bickington*, 3 Q. B. 790, note (a), and therefore inadmissible as evidence. The word "duly" has been repeatedly held not to supersede the necessity of stating the facts from which such conclusion has been drawn: *Regina v. Lewis*, 1 Dowl. & L. 822. There is no provision enabling parishes to which removals take place to inspect documents used for the purpose of such removals: consequently, if distinct information as to the stamp is withheld, the parish is driven of necessity to an appeal. [\*881]

provided for its enforcement. The corresponding sections in stat. 6 & 7 Vict. c. 73, are the 35th and 36th, which also point out the specific punishment, not indeed, as before, a pecuniary penalty, but a punishment for contempt of court. The inability to recover the fees is common \*885] to both statutes. The legislature cannot, in either case, "have intended to make the offence indictable: the disqualification for the recovery of fees would then have been superfluous. Besides, the prohibition in sect. 2 of stat. 6 & 7 Vict. c. 73, is absolute; the clauses as to the penalties, in sects. 35, 36, contain an exception of the case where the party is himself plaintiff or defendant; if sect. 2 is to be construed as creating a misdemeanour, indictable under that clause, the offence will be committed by an act which the legislature clearly did not intend to punish. [PATTESON, J. How can a man act as his own attorney?] The prohibition in sect. 2 includes commencing, carrying on, soliciting or defending "any action, suit, or other proceeding." [Lord DENMAN, C. J. The words "as such attorney or solicitor" clearly run on throughout the first part of the section. PATTESON, J. The omission of those words in sects. 35 and 36 made it necessary to insert the exception there. Lord DENMAN, C. J. Without that, the legislature would have been enacting that a man should not recover fees from himself. PATTESON, J. I do not find any clause making it a contempt to practise in Quarter Sessions.](a) Sect. 25 of stat. 2 G. 2, c. 23, which is in pari materiâ, shows that the Quarter Sessions are included in the general words. The practising at petty sessions is not indeed included: probably it was assumed that no such practice would be allowed by the justices; or, in that case, it may have been thought that the general inability to recover the fees would be a sufficient punishment. [PATTESON, J. In stat. 6 & 7 W. 4, c. 86, under which the defendant was convicted of a misdemeanour in \*Regina v. Price, 11 A. & E. 727, I think no punish- \*886] ment is specified for the offence which was there charged in the indictment, refusing information to the registrar touching the particulars of a birth.] That accounts for the decision, and distinguishes the case from the present. It has sometimes been attempted to qualify the general principle, that a statute prohibiting or commanding an act on pain of a specific punishment does not thereby create a misdemeanour which can be the subject of a general indictment, by suggesting that, where the clause imposing the specific punishment is separate from the enacting or prohibitory clause, the principle does not apply. But that has never been judicially held: and this case must be governed by the general principle to be collected from *Castle's Case*, Cro. Jac. 643; (b) *Rex v. Wright*, 1 Bur. 543; and the two cases, there cited, of *Rex v. Pensar*, (reported in 2 Sess. Ca. 224,) and *Rex v. Malard*, (reported in 2 Sess. Ca.

(a) Sir F. Thesiger, Attorney-General for the crown, observed that this was done expressly, as to county courts, by sect. 36.

(b) See *Mayor of Lichfield v. Simpson*, ante, p. 65

12.) In *Rex v. Wright, Crofton's Case*, 1 Mod. 34, was said not to be law. Some parts of the judgments of the court in *Rex v. Harris*, 4 T. R. 202, appear indeed to contradict this principle; but there no specific punishment was prescribed for the particular offence charged in the indictment. The act here complained of is not one of a public nature, nor morally wrong, in the absence of statutory prohibition. Stat. 5 & 6 W. 4, c. 76, s. 69, provides that notice shall be given of all meetings of town councils except the four quarterly meetings; but would it be an indictable misdemeanour to hold a council without such notice? Many provisions respecting attorneys are merely with a view to the \*revenue. [Sir *F. Thesiger*, Attorney-General, referred to stat. 22 G. 2, c. 46, s. 12.] That assigned the penalty of 50*l.* to the supposed offence here charged: the clear inference is, that it is no misdemeanour. Stat. 3 & 4 W. 4, c. 103, s. 2, prohibits the employment of persons under a certain age in factories for more than a certain number of hours; sect. 29 imposes a penalty on the parents, and sect. 31 on the employer, for the contravention of this act. Could the parents or employers be indicted for a misdemeanour? Stat. 7 & 8 Vict. c. 112, s. 2, prohibits the masters of ships from carrying out seamen without a written agreement specifying certain particulars; sect. 4 imposes a pecuniary penalty. Could the master be indicted for a misdemeanour on the ground that the agreement did not exactly fulfil the requisites of the statute? The proper control of the practice here is lodged in the discretion of the court, who are to visit the contravention of the statute as a contempt. [\*887]

Sir *F. Thesiger*, Attorney-General, *contra*, was stopped by the court.

LORD DENMAN, C. J. I am of opinion that, wherever a person does an act which a statute, on public grounds, has prohibited generally, he is liable to an indictment. I quite agree that, where, in the clause containing the prohibition, a particular mode of enforcing the prohibition is prescribed, and the offence is new, that mode only can be pursued. The case is then as if the statute had simply declared that the party doing the act was liable to the particular punishment. But, where there is a distinct absolute prohibition, the act is indictable. Here the clauses authorizing the \*punishment by a proceeding for contempt are quite distinct from the prohibitory clause. The arguments deduced from the structure of particular statutes cannot prevail: perhaps many of these statutes do contain superfluous provisions. No inference can be drawn here from the clauses which declare the act a contempt. Under the former statute, there was a pecuniary penalty: the present act holds out no such inducement to the prosecution of the offence; and sects. 35 and 36 have (I think, very unfortunately) introduced the declaration that the fact shall be punishable as a contempt, and that the fees shall not be recoverable. Both these provisions were unnecessary. There would obviously be a contempt in such an act, and no costs could be recovera- [\*888]

ble: these consequences would follow from the mere prohibition. The not obtaining a stamp where the act requires it, is a factitious offence: as to that perhaps an express enactment might be necessary to make the omission a contempt. But no such conclusion arises as to the practising without being admitted. I think the true rule is laid down in *Rex v. Wright*, 1 Bur. 543. Lord MANSFIELD uses very general terms: but it is afterwards said by the other judges, and he seems to acquiesce in it, that a general prohibitory clause supports an indictment, "though there be afterwards a particular provision, and a particular remedy given." The decision in *Crofton's Case*, 1 Mod. 34, has, one might almost say, become infamous. There the substantive clause, 17 C. 2, c. 2, s. 3, simply prohibited the act upon pain of a pecuniary forfeit: there was not the least ground for holding it indictable: the contrary principle had been laid down in *Castle's Case*, Cro. Jac. 643.

\*889] \*PATTESON, J. I am entirely of the same opinion. Though there is no distinct decision on the point, the authorities, as summed up by Mr. Williams in note (g) to *Rex v. Dickenson*, 1 Wms. Saund. 135 b, establish the principle.

WILLIAMS and WIGHTMAN, Js., concurred.

Judgment for the Crown.

## The QUEEN against The Inhabitants of HIGH BICKINGTON.

Wednesday, April 29th.

On trial of an appeal against an order of removal, it appeared that one of the documents transmitted with the examinations purported to be the copy of a certificate. It followed the form in sched. (C) to stat. 7 & 8 Vict. c. 101; a proper execution of the certificate appeared, according to sect. 69; and the names of the paupers therein corresponded with the names of the paupers in the order of removal. On it was written a copy of a statement, signed by two justices of the same county, and bearing the same names, with the removing justices, and which declared that the certificate was received by them in evidence on a day named. The day was that of the date of the order of removal. The statement did not show that the certificate was received in the matter of the particular complaint. The examinations stated no chargeability, and did not refer to the certificate. *Held*:

That the transmission of the copies of examinations, and copy of the certificate, thus vouched, were sufficient to satisfy the requisites of stat. 4 & 5 W. 4, c. 76, s. 79; and that the copies contained sufficient evidence of the paupers being chargeable and of the chargeability having been proved before the removing justices.

On appeal against an order of two justices, whereby Ann Ford, wife of John Ford, and Thomas, &c., her children, (after named,) were removed from the parish of Atherington to the parish of High Bickington, both in Devonshire, the sessions confirmed the order, subject to a case which, so far as relates to the point decided by this court, (a) was as follows:

The order of removal was regularly sent by Atherington to High Bick-

(a) Several points were raised by the case; but the counsel for the appellants abandoned all, except that on which the decision took place.



ington, and recited a complaint by the \*parish officers of Atherington, “unto us, whose hands and seals are hereunto set, two [\*890 of her majesty’s justices of peace in and for the county of Devon aforesaid, (whereof one is of the quorum,) that Ann Ford, wife of John Ford, and Thomas, aged about nine years, Mary Ann, aged about seven years, Triphena, aged about four years, and John, aged about one year, her children, lately entered” into Atherington, &c., “and have become actually chargeable” to Atherington; and it found the complaint to be true, and adjudged the settlement to be in High Bickington, and ordered the parishes respectively to remove and to receive the paupers. “Given under our hands and seals, the 13th day of September, in the eighth year of our sovereign Lady Victoria, by the grace,” &c., “and in the year of our Lord, 1844. JOHN DENE, (L. s.) JAMES WHYTE, (L. s.)”

With the order was sent a notice, signed by the churchwardens and overseers of Atherington, stating that the five paupers, naming them, had become chargeable to Atherington, and that the order had been obtained; “a copy of which order, and also a copy of the examinations and certificate of chargeability, on which the same was made, are herewith sent.”

The copies of the said examinations, which purported to be taken on 12th September, 1844, and of the certificate, were sent, as stated, and were set out in the case. The examinations contained no evidence of chargeability, and did not refer to the certificate. The copy of the certificate was as follows.

“The board of guardians of the poor of the Barnstaple union, in the county of Devon, do hereby certify that, on the 7th day of September, instant, Ann Ford,” &c. (describing the five paupers verbatim as was done in the \*order of removal) “became, and now are, chargeable [\*891 ble to the parish of Atherington in the said union. In testimony whereof the common seal of the said guardians is hereunto affixed, at a meeting of their board, this 13th day of September, 1844. (L. s.) A. S. WILLETT, presiding chairman of the board. Countersigned by J. S. CLAY, clerk to the board of guardians of the Barnstaple union.”

“This certificate was received in evidence by us, two of her majesty’s justices of the peace for the county of Devon, and acting therein, the 13th day of September, 1844. JOHN DENE, JAMES WHITE.”

The paper which purported to be a certificate of chargeability appeared to be a copy: the signatures were copies: and the place of the seal was marked with the letters (L. S.)

The following were among the grounds of appeal.

That the examinations contained no sufficient evidence that the paupers, or any or either of them, were, at the date of application for, or making of, such order, chargeable to the parish of Atherington. And that it does not appear, by the said examinations, that any certificate of the chargeability of the said paupers, or any or either of them, was produced or proved before the justices at the making of the said order of removal.

At the trial of the appeal, the appellants admitted that the form of the above certificate was sufficiently in conformity with the words of stat. 7 & 8 Vict. c. 101, s. 69. They contend that the present examination did not sufficiently show that the chargeability of the paupers was ever legally proved before the removing magistrates; and that it did not appear, by any legal evidence, that the paupers named in the copy of \*892] certificate were the \*same parties touching whose settlement the said examinations, and the said order of removal, of the 12th and 13th days of September, 1844, were respectively taken and made. The sessions overruled the objections.

If this court should be of opinion that the sessions were right in overruling the objection, the order of sessions was to be confirmed; if not, the order of removal and order of sessions to be quashed.

*J. Greenwood*, (with whom was *Rowe*,) in support of the order of sessions. It is objected that the certificate does not purport to have been made in the matter of the settlement of these paupers, or so received by the justices. But the statute 7 & 8 Vict. c. 101, s. 69, and the form in schedule (C) to that act, have been strictly followed. The certificate is "sufficient proof of the truth of all the statements contained in such certificate." No oath, and consequently no jurat, is required. On the other side, reliance will be placed upon *Regina v. Shipston upon Stour*, 6 Q. B. 119. There it was necessary that the examinations should be sworn; and the objection arose on the jurat. In this case the certificate appears to be exhibited on the same day as that on which the order is made, to two justices, who are identified, by their names and description of office, with the justices making the order: and the identity of the paupers appears by the date and by the names, one of which, Triphena, is unusual. The case falls within the principle of a large class of decisions as to intendment, which include *Rex v. Thompson*, 2 T. R. 18, 23; (a) *Rex v. Lovet*, \*893] 7 T. R. 152; *Rex v. Swallow*, 8 T. R. 284; *Rex v. Crisp*, 7 East, 389, 393. In *Rex v. Benwell*, 6 T. R. 75, the identity of dates did not appear. The magistrates here were entitled, upon what came before them, to refer the certificates to the paupers; they could indeed refer it to no one else: oral evidence, stating the relief of paupers bearing these names by the parish, would unquestionably have furnished sufficient grounds for the sessions to assume the identity: and what distinction can there be, in this respect, between oral evidence and a certificate? In *Reg. v. Stowford*, 2 Q. B. 526, the court refused to presume that "one Mr. Jackman," named in the grounds of appeal, was identical with "Mr. Jackman," named in the examination. But that was not, as this is, a question of evidence: the point arose on the legal construction of the grounds of appeal.

(He was then stopped by the court.)

*Merivale*, contra. It was necessary to prove, on the appeal, that the

(a) See *Rex v. Stone*, 1 East, 639, 648, note (a).

removing justices had before them evidence of chargeability. And such evidence ought, by stat. 4 & 5 W. 4, c. 76, to be sent to the appellants. But the appellants here have had no means of ascertaining the fact that any such evidence was before the justices. The proper course would have been to identify the paupers by the examination of the party producing the certificate, and to annex the certificate to such examination, as is done in the case of other documents. The paper sent is a mere copy: it is not a document shown to have been before the two justices who made the order. The circumstances suggested as showing identity are insufficient, according to *Regina v. \*Shipston upon Stour*, 6 Q. B. 119. [*\*894* *Regina v. Stowford*, 2 Q. B. 526, and *Regina v. How*, 11 A. & E. 159, are to the same effect. *Regina v. Stockton*, 7 Q. B. 520, shows how strictly the words designating the justices are to be construed. The dates are relied upon, as showing the identity, both of the justices and of the paupers. But the cases referred to in support of this argument were reviewed in *Regina v. Tordoft*, 5 Q. B. 933, and, so far as applicable to the present question, were overruled. Where a previous conviction is insisted upon, oral evidence is required to identify the prisoner with the person named in the certificate under stat. 7 & 8 G. 4, c. 28, s. 11.

*Rowe* mentioned *Regina v. St. Anne, Westminster*, 7 Q. B. 245.

LORD DENMAN, C. J. We have no doubt.

PATTESON, WILLIAMS, and WIGHTMAN, Js., concurred.

Orders confirmed.

**\*ROGERS against GRAZEBROOK and Another. Friday, May 1st. [*\*895***

In trespass quare clausum fregit, the plaintiff made title under a mortgage deed of March 6th, 1840, by which the mortgagor, H., demised premises to the plaintiff from thenceforth for a certain term, subject to a proviso that the demise should cease and be void if H. paid principal and interest by March 6th, 1841, and interest at stated periods in the meantime; and to another proviso, empowering plaintiff to sell (after three months' notice) if default should be made in payment of principal and interest at the times named. Then followed covenants (among others) by H. to plaintiff, for payment of principal and interest at the days appointed, and that, at any time after default made in such payment, it should be lawful for plaintiff peaceably and quietly to enter upon the premises, and from thenceforth, for the residue of the term, to hold the same and take the rents and profits without lawful interruption from H. or any other person, &c.

On pleadings in trespass, setting forth the deed, and showing that plaintiff had entered upon the mortgaged premises after the execution of the deed but before March 6th, 1841, and before default in payment, and raising the question whether or not he had a right so to enter,

*Held*, that the deed gave power to the mortgagee to enter before default, and before the day named for any payment.

TRESPASS for breaking and entering plaintiff's messuage, continuing therein, and taking and converting the issues and profits, &c.

Plea 3. That, before the first of the times when, &c., to wit, on, &c., George Taylor was seised in his demesne as of fee of the close on which

the said messuage is, and at the times when, &c., was standing, and, being so seised, demised the close to Charles Berners, his executors, administrators, and assigns, from 29th September, 1804, to the full end, &c., of ninety-seven years thence next, &c.: and Berners entered and was possessed, and demised the close to Kerrison for sixty-one years, and Kerrison to Reddell for twenty-one; that Reddell became bankrupt, and his assignees accepted his lease and assigned the residue of his term (twenty-one years, from December 25th, 1835) to Freeman, who demised to Reuben Hunt for seventeen years (wanting fourteen days) from December 25th, 1839; that Hunt entered and built the messuage upon the said close; that he afterwards became bankrupt, and the defendants were chosen \*896] assignees by the creditors; and they, and Cannan, the \*official assignee, before any of the times when, &c., accepted Hunt's lease, and elected to become assignees of his term, and by reason thereof they, with Cannan, became lawfully entitled to and possessed of the said messuage as forming part of Hunt's estate at the time when he became bankrupt. Averment, that, while defendants and Cannan were so entitled and possessed, the plaintiff, claiming title to the possession of the premises under colour of a certain fraudulent and void lease to him thereof made by Hunt with intent to cheat the creditors and assignees, whereas nothing of or in the said messuage ever passed to plaintiff by such lease, afterwards, and before the first of the times, &c., and while defendants and Cannan were entitled, &c., to wit, on, &c., entered into the messuage and was possessed thereof; and thereupon, &c.: justification by defendants in their own right as assignees of Hunt, and also as servants to Cannan. Verification.

Replication to plea 3. That, after the demise by Freeman to Hunt, and before Hunt's bankruptcy, and while he was possessed, &c., to wit, on March 6th, 1840, Hunt, by indenture between him and plaintiff of that date, (profert,) demised the messuage, &c., to plaintiff for all the residue, except the last day, of Hunt's term, which term so granted to plaintiff was in full force at the times when, &c.; by virtue of which demise, and while the same was in force, and after Hunt's bankruptcy, and after defendants and Cannan had become, and while they were possessed of the messuage, &c., and before the times when, &c., to wit, on, &c., plaintiff entered into and was possessed of the messuage for the term granted to him, whereof defendants had notice; and that afterwards, and while plaintiff \*897] was so possessed, to wit, at the times \*when, &c., defendants of their own wrong committed the trespasses, &c. Verification.

Rejoinder, craving oyer of the last-mentioned deed, which was then set out. The material parts were as follows. The indenture, dated 6th March, 1840, between Hunt of the one part, and Rogers, the plaintiff, of the other part, recited the lease by Freeman to Hunt; that Hunt was indebted to Rogers in 500*l.* for money lent, and for securing that sum and all such other sum and sums as Hunt might afterwards owe to Rogers,

(not exceeding in the whole 1900*l.*.) with interest, had agreed to execute an assignment to Rogers by way of mortgage. It was therefore witnessed that, in pursuance of the agreement, and for securing, &c., Hunt granted, bargained, sold, and demised to Rogers, his executors, &c., all the pieces of ground, buildings,<sup>(a)</sup> &c., described in the recited lease, then in the occupation of George Scammell, &c., habendum to Rogers, his executors, &c., from thenceforth for all the residue of the term of seventeen years, wanting fourteen days, granted by the lease, except the last day of that term. subject nevertheless to the provisoes, &c., after contained. Provided always, and it was thereby agreed and declared between and by the said parties, that, if Hunt, his heirs, executors, &c., do and shall, on or before the 6th day of March which will be in 1841, pay or cause to be paid to Rogers, his executors, &c., the sum of 500*l.* of lawful money, &c., with interest, &c., together also with all such further sum or sums of money as Hunt shall at any time or times hereafter owe to Rogers on any account whatsoever, (not exceeding, &c.,) with interest, &c., and if Hunt \*do and shall, in the meantime and until the said sum of 500*l.* [\*898 and such further sum, &c., shall be fully paid and satisfied, pay the interest of the same moneys respectively by equal quarterly payments on, &c., then, and in that case, these presents and the demise and assignment hereby made, and every thing herein contained, shall cease and be void. Proviso and agreement: "That, in case default shall be made in payment of the said sum of 500*l.*, and such further sum and sums of money as aforesaid, or the interest thereof, or any part thereof, respectively, at or on the days or times hereinbefore appointed for payment thereof, then that it shall be lawful for the said T. Rogers, his executors or administrators, immediately or at any time or times thereafter, of his or their own authority, and without the consent or concurrence of, or any further power from the said R. Hunt, his executors," &c., "to make sale of the said leasehold and other premises hereinbefore demised and assigned, with their appurtenances, or any part thereof," &c., for the most money that can then be reasonably obtained, &c., and to apply the moneys to arise from such sale in discharge of expenses, &c., and in repayment to himself of the said 500*l.* and such further sum and sums, &c., and the interest, &c., and to pay the residue to Hunt, his executors, &c., and if any part of the premises shall remain undisposed of, then, on request by Hunt, his executors, &c., to assign or surrender the same to him or them, discharged from all encumbrances, &c., to be done or committed by Rogers, his executors, &c. Proviso: That no sale shall be made without three months' notice by Rogers, his executors, &c., requiring payment, &c. Proviso and agreement: That the power of sale, or any \*other [\*899 matter herein contained, shall not prejudice or affect the right of Rogers, his executors, &c., to foreclose the equity of redemption of the premises or of the unsold parts thereof for the time being after any default

(a) There was also an assignment of fixtures, on which nothing now turns.

in payment of the 500*l.* and of such further sum, &c., and the interest, &c., or of so much thereof as shall then remain due for three calendar months next after payment shall have been required by notice in writing, &c. Covenants by Hunt to Rogers to pay him, his executors, &c., the 500*l.* and such further sum, &c., with interest for the same respectively after the rate and at the times appointed for payment in the proviso for redemption of the premises or for determining the term: that the lease is valid, &c.: and that, while the 500*l.*, &c., or the interest shall remain owing upon this security, Hunt, his executors, &c., shall and will pay, perform, and keep the rents, covenants, and agreements, by and in the said indenture of lease reserved and contained, and indemnify and save harmless Rogers, his executors, &c., and the demised premises, from and against the payment and performance thereof respectively, and from and against all actions, suits, &c., on account of the non-payment or non-performance thereof, and all loss, costs, &c., in respect of any such action, &c. Covenant for title in Hunt to demise and assign. Further covenant by Hunt to Rogers: "That, at any time after default shall be made in payment of the said sum of 500*l.*, or of such further sum," &c., "or the interest thereof respectively, contrary to the proviso and covenant hereinbefore contained, it shall be lawful for the said T. Rogers, his executors," &c., "peaceably and quietly to enter into and upon the said leasehold premises hereby demised, or any part thereof, and from thenceforth for all \*900] the then residue of the said term of \*years thereof granted as aforesaid, except the last day thereof, to hold and enjoy and receive and take the rents and profits thereof, and of every part thereof, to and for his and their own use and benefit, without any lawful interruption whatsoever from or by the said R. Hunt, his executors or administrators, or any other person or persons whomsoever, and that free from, or otherwise by the said R. Hunt, his heirs, executors, or administrators, well and sufficiently indemnified and protected against, all estates, rights, interests, liens, charges, and encumbrances whatsoever." Covenant for further assurance: and covenant to assign for the last day of the term, if required, &c.

The rejoinder, after oyer, stated that the 6th March, 1841, in the said proviso mentioned, had not arrived, nor had default been made by Hunt in payment of the money in the said proviso mentioned or any part thereof, or of the said interest or any part thereof, before or at any of the times when, &c., nor before or at the time when plaintiff entered into and upon the said messuages, &c., in manner, &c. Verification.

Demurrer, assigning for cause: 'That the plaintiff had a right to enter and become possessed immediately after the demise was made to him by the deed set out, and before the 6th day of March; and that neither Hunt nor his assigns were entitled, after that demise, to the possession as against the plaintiff. Joinder.

Plea 4. After deducing title to Hunt, and averring his possession and



the building of the messuage by him, as in plea 3: That, Hunt being so possessed, &c., afterwards, on 6th March, 1840, and before the first of the times when, &c., by indenture between Hunt of the one part and plaintiff of the other part, (excuse of \*profert,) dated the day and year last aforesaid, Hunt by way of mortgage demised the premises for all the residue of his term (except the last day) to the plaintiff, subject nevertheless to certain provisoes, covenants, &c., in that indenture contained; viz., &c. The plea then recited the proviso of the mortgage deed for determining the demise if the principal should be paid on or before March 6th, 1841, and interest in the meantime, the stipulation for power of sale in case of default, the proviso for notice before sale, the reservation of power to foreclose, and the covenant by Hunt giving power to the plaintiff, on default made in payment, to enter and hold without lawful interruption, &c. As by the said last-mentioned indenture, &c. Averment, that from the making of the said indenture continually up to and until the bankruptcy of Hunt after mentioned, Hunt remained in the actual possession of the messuages, &c., in the declaration mentioned, and in which, &c., according to the true intent and meaning of the said indenture and of the parties thereto: And that Hunt, being so in the actual possession, &c., afterwards, and before the said 6th March, 1841, mentioned in the said proviso in the said indenture contained, and also before any default in payment, &c., and before the first of the said times when, &c., became and was a bankrupt, and defendants and Cannan became and were assignees, &c., as in the third plea mentioned. And that defendants and Cannan, as assignees of Hunt as aforesaid, afterwards, and after his bankruptcy, and before any default in payment, &c., and before 6th March, 1841, and before the first of the said times when, &c., to wit, on 8th September, 1840, elected to accept, and did accept, the estate and interest which Hunt at the time of his said bankruptcy had in the said messuage, &c., in which, &c.; whereupon, and by means of the premises, defendants and Cannan became and were entitled to the possession of the said messuage, &c., as assignees of Hunt as aforesaid. Averment, that, whilst defendants and Cannan were so possessed and entitled, as assignees, &c., to the possession of the said messuage, &c., the plaintiff, claiming title to the said messuage, &c., under colour of a certain fraudulent and void lease to him thereof made by Hunt, to wit, just before his said bankruptcy, with intent to cheat and defraud the creditors and assignees of Hunt, pretended to be thereof made to him by Hunt for a certain term in the said pretended lease mentioned, whereas nothing of or in the said messuage, &c., ever passed, &c., afterwards, and before the first of the said times when, &c., and before any default in payment, &c., and before the said 6th March, 1841, in the said proviso mentioned, and whilst defendants and Cannan were entitled to the possession thereof as assignees as aforesaid, to wit, on 23d December, 1840, entered into and upon the said messuage, &c.,

in which, &c., and was thereof possessed. And thereupon, &c.: justification by defendants as assignees of Hunt and entitled, &c. Verification.

Replication. That, after the making of the demise by Hunt to plaintiff as in the 4th plea first mentioned, and while the same was in full force, &c., and after the bankruptcy of Hunt, and while defendants and Cannan were so possessed as in the 4th plea mentioned, and before the times when, &c., to wit, on 30th December, 1840, plaintiff, by virtue of the said demise, entered into and upon the said messuage, &c., and became  
 \*903] and was possessed thereof for the said term so to him \*granted as in the 4th plea is first mentioned, whereof defendants, before the times when, &c., had notice. And that afterwards, and while plaintiff was so possessed, &c., to wit, at the several times when, &c., defendants of their own wrong committed the trespasses as in the declaration above complained, &c. Verification.

Demurrer, alleging, among other causes, that the replication does not show that the 6th March, 1841, in the indenture and proviso mentioned, had elapsed, or that any default in payment of principal or interest had been made before plaintiff entered; that it does not properly traverse any material allegation of the plea; and that, if intended as a traverse, it should have concluded to the country. Joinder.

*Martin*, for the plaintiff. The lease of March 6th, 1840, was a present demise to the plaintiff, giving an immediate right of entry; and there was no redemise to Hunt. The covenant for peaceable entry and holding by Rogers, which the defendants will rely upon, is only a restricted covenant for quiet enjoyment, applicable to the contingency of Roger's entering after the 6th of March, 1841, or after a default in payment. It was reasonable to stipulate that, if Rogers elected to take possession before the 6th of March, 1841, or a default, he might do so, but that Hunt should not be answerable for quiet enjoyment until March 6th, 1841: and that is the sense of the covenant. In *Doe dem. Roylance v. Lightfoot*, 8 M. & W. 553, 559, the same construction was put upon a similar clause. *Doe dem. Parsley v. Day*, 2 Q. B. 147, was a case resembling the present, and is a direct authority for the plaintiff. Independently of authorities,  
 \*904] the place which \*the present covenant occupies in the deed sufficiently shows its purpose. This being so, the rejoinder to the replication to plea 3, alleging that the 6th of March, 1841, had not arrived, nor had default in payment been made, when plaintiff entered, is no answer; and the demurrer to the replication to plea 4, so far as it proceeds upon the same objection, is unsupported. As to the other suggestion in that demurrer, that the replication does not traverse any material allegation of the plea, it does in effect traverse such an allegation, by stating that, after the demise by Hunt to the plaintiff, and before the times when, &c., the plaintiff entered. The materiality of such an averment was noticed in *Wheeler v. Montefiore*, 2 Q. B. 133, where Lord DENMAN, C. J., in delivering judgment, said: "It is laid down in Co. Litt. 296 b,

Com. Dig., *Trespass*, (B), and many other places, that a lessee before entry cannot maintain trespass.”(a)

*Peacock*, contra. On the construction of the deed, *Wheeler v. Montefiore*, is an authority for the defendants. There the mortgage deed contained a demise by Franks to the plaintiff to hold from thenceforth for a term of years, subject to a proviso that, if Franks should pay principal and interest on 24th June then next, plaintiff should reconvey; and a further proviso that, if default should be made in payment of principal and interest at the day named, it should be lawful for plaintiff to enter, and, if he thought proper, to sell. This court said: “There is no covenant that Franks shall remain in possession till the 24th of June; but, looking at the \*whole deed, we are of opinion that the plaintiff’s right to take possession did not attach until the 24th June, therefore that the verdict found for him on the second plea,” (which denied that the dwelling-house, &c., were the dwelling-house, &c., of the plaintiff,) “is wrong.” [WIGHTMAN, J. Was any thing said there to distinguish the case from *Doe dem. Roylance v. Lightfoot*, 8 M. & W. 553, 559?] That case was not cited, and probably had not been reported. In *Doe dem. Roylance v. Lightfoot*, the proviso was that, in case principal and interest were truly paid, the mortgagee should “reconvey;” here it is only that the demise “shall cease and be void,” which is less favourable to the supposition of an immediate possessory interest in the mortgagee. And the deed here contains a covenant, (not merely a proviso, as in *Wheeler v. Montefiore*, 2 Q. B. 133,) that, at any time after default in payment, it shall be lawful for the mortgagee to enter. The parties cannot be supposed to have contemplated that the mortgagor should be turned out immediately on executing this deed. Looking at the whole instrument, as this court did in *Wheeler v. Montefiore*, it must be collected that the mortgagee was to wait till his money was due and default made in payment, and that he was not to enter unless in case of default. [PATTESON, J. You say that, until default, the mortgagor had a sort of tenancy under the deed.] He had. A similar view was taken by the Court of Common Pleas in *Wilkinson v. Hall*, 3 New Ca. 508; which case was acted upon as an authority by this court in *Doe dem. Lyster v. Goldwin*, 2 Q. B. 143. The language of the judgment in *Doe dem. Parsley v. Day*, 2 Q. B. 147, seems to imply that trespass could not there have been brought before the 5th of October, the day named for payment. [\*905]

*Martin*, in reply. The observations of the court in *Wheeler v. Montefiore*, 2 Q. B. 133, as to the construction of the deed, cannot be deemed satisfactory after the remarks made upon that case in *Doe dem. Parsley v. Day*, and the assent there given to the decision of the Court of Exchequer in *Doe dem. Roylance v. Lightfoot*, which does not in any material respect differ from the present case. But, assuming *Wheeler v. Montefiore*, [\*906]

(a) Some other grounds of special demurrer to this replication were mentioned, but given up, on the argument.

*fiore*, to be well decided, it is distinguishable from this case. There it was the mutual agreement of the parties, in provisos immediately following and connected with the granting part of the deed, that, if principal and interest were paid on the 24th of June, the mortgagee should reconvey; and that the mortgagee should enter and take the rents and profits if default should be made in such payment at the day. Here the mortgagor in the first instance demises absolutely, so that the interest becomes vested in the mortgagee; and then follows a proviso, in the nature of a condition subsequent, that the demise shall "cease and be void" in case of payment at the day named. The ensuing covenant, on which the defendants rely, that, in case of default, it shall be lawful for the mortgagee to enter, is not a mutual agreement, as in *Wheeler v. Montefiore*, but the mortgagor's own covenant. So in *Doe dem. Roylance v. Lightfoot*, the provision for the mortgagee's entry on non-payment was by covenant of the mortgagor.

\*907] \*Lord DENMAN, C. J. I think that *Wheeler v. Montefiore* is distinguishable from this case on the ground taken by Mr. *Martin*, and that the decision there is defensible on the ground stated in *Doe dem. Parsley v. Day*, 2 Q. B. 147, that a lessee for years before entry cannot maintain trespass. And no attempt has been made to distinguish the present case from *Doe dem. Roylance v. Lightfoot*. Our judgment must be for the plaintiff.

PATTESON, J. No distinction has been attempted between this case and *Doe dem Roylance v. Lightfoot*. There are circumstances which distinguish the case before us from *Wheeler v. Montefiore*, whether sufficiently or not I do not say; for there the mortgagee had never taken actual possession; and, by the agreement in which he had joined, he had precluded himself from taking possession before the day named for payment.

WILLIAMS, J., concurred.

WIGHTMAN, J. The question here is, whether or not the plaintiff had a right to enter under the demise: that distinguishes the case from *Wheeler v. Montefiore*, and brings it within the authority of *Doe dem. Parsley v. Day* and *Doe dem. Roylance v. Lightfoot*. In *Wheeler v. Montefiore*, the mortgagee had not entered; the only question here is, whether or not he had the right to enter. Judgment for plaintiff.

\*HIGGINS against THOMAS. *Friday, May 1st.*

[\*908]

To a declaration in trover, defendant pleaded that, before and at the time of the committing, &c., he and plaintiff were jointly and together the owners and proprietors of the chattel. *Held* bad, on special demurrer, because, if the conversion was denied, the plea amounted to not guilty, and, if it was confessed, the plea could be understood only as confessing a destruction of the chattel, which was not justified.

**TROVER.** The declaration alleged that the plaintiff "was lawfully possessed, as of his own property," of certain goods, &c., to wit, two clocks; that he lost them, and that they came to defendant's possession by finding; yet defendant, well knowing the said goods to be the property of the plaintiff, and then of right to belong and appertain to the plaintiff, but contriving, &c., had not delivered, &c., and had converted and disposed thereof to his own use.

Pleas. 1. Not guilty. Issue thereon.

2. That plaintiff was not possessed, as of his own property, &c., in manner, &c. Issue thereon.

3. That before and at the time of the committing, &c., the plaintiff and defendant were jointly and together the owners and proprietors of the said goods and chattels in the declaration mentioned. Verification. Special demurrer, assigning for causes that the plea amounts to the general issue, and is an argumentative denial that the plaintiff was possessed of all the said goods and chattels in the declaration mentioned as of his own property, and does not sufficiently confess that the defendant committed the grievances in the declaration mentioned. Joinder in demurrer.

The demurrer now coming on for argument, the court called on

*Phipson*, for the defendant. The plea contains a good confession and avoidance. According to *Stancliffe v. Hardwick*, 2 C., M. & R. 1; S. C. 5 Tyrwh. 551, not guilty, since the new rules, puts in issue only a conversion in fact; and, under that plea, it cannot be shown that the conversion was not wrongful. It is true that, in *Whitmore v. Greene*, 13 M. & W. 104, 107, PARKE, B., said: "We came to an erroneous conclusion in the case of *Stancliffe v. Hardwick*, that the new rules have made any difference as to the meaning of a conversion:" and he referred to *Unwin v. St. Quintin*, 11 M. & W. 277, as an authority showing that facts which establish a property in the defendant may be given in evidence under one or other of the pleas not guilty and not possessed; and ALDERSON, B., said that these two pleas together now make up the old not guilty. Afterwards, in *Kynaston v. Crouch*, 14 M. & W. 266, 272, PARKE, B., expressed again his doubts as to the doctrine of *Stancliffe v. Hardwick*. The point can hardly be considered as settled; in 3 Chitt. Pl. 941, (a) 6th ed., and in Chitty Junr.'s Precedents in Pleading, 677, (b)

(a) In ed. 7, the plea is not inserted. See vol. iii. p. 285.

(b) See *Kieran v. Sanders*, 6 A. & E. 515.

are special pleas, in trover, of tenancy in common: and in the work last mentioned, p. 673, (note,) it is said: "It seems that the above plea of no property in plaintiff, imports that he had no title whatever, and that the defendant will fail on the issue, although the plaintiff be only a tenant in common, &c. Where there has been an *actual* conversion, and the defendant justifies as a tenant in common with the plaintiff," "it seems that the plea should specially disclose the real and precise state of the title to the goods, &c., and that the general traverse is not sufficient."

\*910] As to the plea of not possessed, it seems \*difficult to see how it is supported by evidence of a joint property: each joint tenant, as against the other, has a right to some possession; and, at the lowest, the plea here gives colour, and sets up matter of law as well as fact, and is therefore good, even though the matter might have been given in evidence under a traverse: 1 Bro. Abr. 140 b, *Colour*, pl. 15; *Unwin v. St. Quintin*, 11 M. & W. 277; Com. Dig. *Pleader*, (E 14,) (3 M 41;) *Rockwood v. Feasar*, Cro. Eliz. 262; *Comyns v. Boyer*, Cro. Eliz. 485; *Doctor Leyfield's Case*, 10 Rep. 88 a, 91 b; *Fancourt v. Bull*, 1 New Ca. 681, 689; *Stirt v. Drungold*, 3 Bulst. 289; *Pearson v. Rogers*, 9 A. & E. 303; *Carr v. Hinchliff*, 4 B. & C. 547. In *Jackson v. Cummins*, 5 M. & W. 342, 349, PARKE, B., referring to the decision, (in *Owen v. Knight*, 4 New Ca. 54,) that a lien may be given in evidence under the plea of not possessed, says only that, after that ruling "as to the effect of lien in actions of trover, the defendant would have done better to have pleaded that the plaintiff was not possessed." It is not a question, on this demurrer, whether the third plea ought to have been allowed together with the other two. [Lord DENMAN, C. J. Suppose the conversion here to have been a destruction: could the joint owner justify?] While the joint tenancy exists, trover does not lie at all. If one of two tenants in common of a dove-house destroy the old doves, whereby the flight is wholly lost, he may be sued by the other in trespass; "for the whole flight is destroyed, and therefore he cannot in bar plead tenancy in common;" Co. Lit. 200 a, 200 b. The reason of this is that the destruction is a severance: and \*911] with this agrees \*14 Vin. Abr. 516, *Jointenants*, (S. a,) pl. 15: where the reason given is: "for there can be no tenancy in common of a thing destroyed." In Com. Dig. *Estates*, (K 8,) it is laid down that, if one tenant in common actually ousts his companion of the possession, the latter may maintain ejectment; but that one cannot dis-seise the other without an actual ouster. And, in *Fennings v. Lord Grenville*, 1 Taunt. 241, 249, CHAMBRE, J., applied the same doctrine to trover for a chattel, saying: "There are cases which establish the principle that one tenant in common cannot recover for a chattel in trover against his companion, without first proving a destruction of the chattel, or something that is equivalent to it. There must be that which amounts, as it were, to an ouster, so that a tenant in common who commits it, cannot account." The law, therefore, strictly expressed, is, not that one



joint tenant or tenant in common can maintain ejectment against another, but that, when, by the act of one, the joint tenancy has been put an end to, the other, being no longer a joint tenant, may maintain ejectment. So it is in the case of a chattel: after the destruction there is no joint tenancy or tenancy in common. That being so, the plea here, which alleges a joint tenancy, excludes the supposition of a destruction; and, if the plaintiff had traversed the matter in the plea, he would have succeeded by showing the fact of destruction. The plea, therefore, does not set up a justification of a destruction, but confesses and avoids the right alleged in the declaration.

*Lush*, contra. If the latter part of the argument be correct, the plea is an arguer<sup>t</sup>ative traverse of the \*conversion, inasmuch as it ex- [\*912  
cludes the only supposition on which there could be a conversion. If it does admit the conversion, in the sense of destruction, it does not justify it. [PATTESON, J. Then the joint tenancy ought to be provable under the plea of Not guilty; which is contrary to *Stancliffe v. Hardwick*, 2 C., M. & R. 1; S. C. 5 Tyrwh. 551.] That case, so far as relates to the present question, is not law, as appears from the authorities mentioned on the other side. [WIGHTMAN, J. referred to *Farrar v. Beswick*, 1 M. & W. 682; S. C. Tyrwh. & Gr. 1053. PATTESON, J. The court, in *Stancliffe v. Hardwick*, appear to think that there may be a conversion by a tenant in common which may be justified.] They do so; and that may appear to be countenanced by the judgment of COLERIDGE, J., in *Weeding v. Aldrich*, 9 A. & E. 861, 867; but it seems to be a fallacy. There is no such thing as a conversion in fact, which is not illegal. The only effect of the New Rules is, that the possession can no longer be traversed under Not guilty; but the plea of Not possessed and the plea of Not guilty now together introduce every defence which formerly could be given under Not guilty. In *Mason v. Farnell*, 12 M. & W. 674, 683, the Court of Exchequer distinguishes detinue from trover, on the ground that a conversion "is always a wrongful act, and cannot, therefore, be confessed and avoided." (He was then stopped by the court.)

LORD DENMAN, C. J. The dilemma, as put by Mr. *Lush*, cannot be evaded. The conversion is either not admitted or not justified.

\*PATTESON, J. The plea ought to confess and avoid. If it [\*913  
denies the conversion, it amounts to Not guilty; if it confesses it, it admits that sort of conversion which alone a joint tenant can commit, and it does not avoid such a conversion by showing any justification.

WILLIAMS, J. I am of the same opinion. If the conversion is not admitted, the plea should be Not guilty: if it is admitted, a destruction is admitted, which is not justified.

WIGHTMAN, J. I concur, upon the grounds assigned by the rest of the court.  
Judgment for the plaintiff.

WOOD against HEWETT. *Monday, May 4th.*

When a chattel has been annexed by its owner to another's freehold, but may, without injury to the freehold, be severed, it is not necessarily to be inferred from the annexation that such chattel becomes the property of the freeholder. Whether, in a particular case, it has become so or not, may be a question on the evidence; and a jury may infer, from user or other circumstances, an agreement, when the chattel was annexed, that the original owner should have liberty to take it away again.

**TRESPASS.** The declaration stated that defendant, on, &c., with force and arms, &c., seized, pulled up, moved and displaced a certain fender and hatch of the plaintiff of great value, to wit, &c., and which fender and hatch was then placed and being near and adjoining to a certain stream of water which flowed to a certain mill of the plaintiff, situate, &c., and which said fender, &c., just before and at the time of committing the said trespass, was used and employed by plaintiff in keeping the said stream in its course and channel towards and unto his said mill; by reason of which seizing, pulling up, &c. of the said fender and hatch, the  
 \*914] \*water of the said stream escaped and was prevented from flowing to the said mill of the plaintiff as it otherwise would, &c.

Pleas. 1. Not guilty. 2. That the fender and hatch were not, nor was either of them, the fender or hatch of plaintiff as in the declaration is alleged. Conclusion to the country. Issue thereon. 3. Alleging twenty years' enjoyment of the use and benefit of sufficient water from the stream to water defendant's close, and justifying the removal of the fender and hatch as being wrongfully placed near and adjoining to the said stream, and obstructing defendant in taking a sufficient quantity of the water, &c. Verification. Replication, De injuriâ. Issue thereon.

On the trial, before COLERIDGE, J., at the Exeter Spring assizes, 1845, evidence was given for each party on the several issues: and it appeared that the fender (described in the declaration as a fender or hatch) rested on masonry and brickwork which were fixed in the bank of the mill stream, above the mill. There was evidence to show that the soil on which these works stood belonged to the defendant, who was tenant from year to year of a close called the Great Meadow, adjoining the mill stream. The fender was moved up and down in a groove, as occasion required, and might be entirely taken out. It was beneficial to the mill, by holding up the water, and had also been frequently used for letting out water upon the defendant's close. It was put up forty-three years ago, in the time of a former occupier of the Great Meadow, under whom the defendant claimed. About nine years ago some repairs had been done to the masonry, with  
 \*915] assistance from the plaintiff; and soon afterwards the plaintiff removed the old fender and put in a new one, but without the consent of the tenant for life, who, when he knew what had been done, threatened to bring an action.

The learned judge, in summing up, said, as to the second issue, that it involved some difficult points, but he thought the jury would be of opinion that the property in the hatch itself remained with the plaintiff. He afterwards added that, if it was clear on the evidence that the banks, at the mill, belonged to the miller, the hatch would seem to belong to him; and, upon the whole, he recommended the jury to find for the plaintiff on the second issue. Verdict for plaintiff, on all the issues. *Crowder*, in Easter term, 1845, obtained a rule nisi for a new trial on the grounds of misdirection as to the second issue, and that the verdict, generally, was against the weight of evidence.

*Cockburn* and *M. Smith* now showed cause. The argument on the other side is, that the fender must necessarily be taken to have been the defendant's property because the structure on which it rested was on his soil. But this was a question of fact, on which the jury were to decide; and it was so left to them. The issue turned upon the right to the fender only, not to the immovable masonry and brickwork; and the fender, by its construction and the manner in which it was placed, did not properly answer the description of a fixture. It is true, that if a man puts up a chattel of this kind on another person's soil, it may become the property of that person: but there may, on the other hand, be evidence, as from forty years' exercise of an apparent right of ownership, that the party who erected it, if not proprietor of the soil, had the easement of \*keep- [\*916 ing a chattel belonging to himself on the ground of his neighbour; and, in that case, the chattel, lawfully attached by its owner to the soil, would not necessarily pass to the owner of the land. [WILLIAMS, J. What should you say to a gate?] The same observation would apply. In *Mant v. Collins*, (a) the plaintiff sued in trespass for driving nails into his door, which (as appeared in evidence) was hung on hooks to the entrance of a pew in a chapel. The owner of the pew had permitted the plaintiff to occupy it, and had also given him leave to put up the door, and to remove it when his occupation ceased. The plea was that the door was not the goods and chattels of the plaintiff; and on this the parties were at issue. It was argued, for the defendant, that the door, while annexed to the pew, was part of the freehold to which (as it was said) the pew belonged, and therefore that it was not the property of the plaintiff, who had not the freehold right in the pew: (b) but this court held that the door was a chattel. (c) [Lord DENMAN, C. J. The defend-

(a) Tried at Winchester Spring Assizes, 1841, before Erskine, J. Argued in Q. B., on motion to enter a nonsuit, May 24th, 1842, before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js. For the plaintiff, *Erle* and *Butt*; for the defendant, *Crowder* and *Bastons*. Judgment delivered, June 9th, 1842. Not reported.

(b) Patteson, J., and Coleridge, J., observed during the argument, that, by agreement, a tenant might have license to remove, at the end of his term, something which was legally part of the freehold, but it did not follow that the thing, in the meantime, could be treated as a chattel.

(c) Lord Denman, C. J., delivered the judgment of the court in the following words only "It is sufficient to say that we think the door was a good and chattel."

ant there said that the pew itself was not shown to be part of the freehold.]

*Crowder, J. Greenwood and Cornish*, contra. *Mant v. Collins*, turned  
 \*917] on the particular facts of the case, \*and decided no question of law. It is suggested here that the fender is a chattel, because it moves up and down in a groove; but articles affixed in the same way have been deemed a part of the freehold: and the proper conclusion here was, that if the soil was the defendant's he was entitled to the fender. If a man plants a tree in another's soil, or builds a wall upon it, the tree or wall becomes the property of the land-owner;(a) and the same principle applies here. [COLERIDGE, J. Why may not there have been, when the mill was built, a concession of rights by the owner of the meadow, which would make the fender to all purposes the property of the miller? Might not he acquire the easement of having his fender on the defendant's land? Lord DENMAN, C. J. It might have been understood by both parties that the fender should be deemed a separable chattel. That is less likely to be the case with a tree, because the tree could not be removed without probably destroying it.] An agreement of so peculiar a kind will not be presumed; and none was shown in this case. In *Place v. Fagg*, 4 Man. & R. 277, where the sheriff had seized mill-stones under an execution against the goods of J. A., the mill-stones were on the mill premises, which J. A. had mortgaged to the plaintiff; and, the question being whether, at the time of the seizure, the mill-stones were or were not the plaintiff's property, this court held that they passed by the mortgage, and must be deemed part of the freehold. Reference was there made to *Liford's Case*, 11 Rep. 46 b, 50 b, where *Wystow's Case*, Yearb. Pasch. 14 H. 8, 25 B, pl. 6, is cited, and it is stated, on that authority,  
 \*918] that, if a mill-stone be taken out of the mill to be \*picked, "yet it remains parcel of the mill, as if it had always been lying upon the other stone, and by consequence by the lease or conveyance of the mill it shall pass with it: so of doors, windows, rings, &c. The same law of keys; although they are distinct things, yet they shall pass with the house." By the same rule the hatch, here, even if severed, would have remained parcel of the freehold, as partaking of the nature of the stone and brickwork to which it was annexed. It would fall under the general law that the accessory follows the principal. A party may have the easement of keeping up a hatch in his neighbour's soil, and may have an action on the case against that party if he removes it; but the hatch is not the less part of the freehold. [Lord DENMAN, C. J. The grant might be of liberty, not only to come on the land and put the hatch up, but to take it away at pleasure. COLERIDGE, J. You assume the general rule of law to be so stringent that no evidence can overcome it. Suppose it had been proved that the plaintiff had for many years been accustomed to take the hatches away and burn them.] The hatch forms

(a) See *Empson v. Soden*, 4 B. & Ad. 655.

part of one entire structure intended to keep back the water; and the case furnishes no ground for distinguishing this part from the rest.

(At the end of the argument, *Rex v. Otley*, 1 B. & Ad. 161, (a) was mentioned on behalf of the plaintiff.)

LORD DENMAN, C. J., The question is whether, because the fender in this case had been placed on the defendant's soil, it became his property, as a necessary consequence of its position. I am of opinion that such \*a consequence never follows of necessity, where the chattel is [\*919 separable. This appears sufficiently from *Rex v. Otley*, 1 B. & Ad. 161. The decision in *Mant v. Collins*, antè, p. 916, is so far an authority in point of law, as it shows that, in a case of this kind, it is always open to inquiry, how the article came to be in the place in which it is found, and what the parties intended as to its use; and the respective rights may be determined by the evidence on these points. In the present case there were circumstances from which the jury might infer that the plaintiff had become entitled to have a fender, his own property, standing in the soil of the defendant; and there was no proof that the defendant had asserted any right derogatory to this privilege in the plaintiff. The argument from the nature of the thing decides nothing: the manner of its becoming connected with the soil may be merely accidental. If a heavy stone bason is placed on a man's land, it is not a fixture. If it sinks into the soil, and in that manner becomes fixed, is it therefore a fixture? The rights, in such a case, must always be subject to explanation by evidence.

PARTESON, J. This question does not turn upon any general doctrine of law, but upon the evidence in the case. The general rule respecting annexations to the freehold is always open to variation by agreement of parties: and, if a chattel of this kind is put up so that the owner can remove it, I do not see why it should necessarily become part of the freehold, or why it should not be removable when the owner thinks fit, if it appears to have been so agreed.

\*WILLIAMS and COLERIDGE, Js., concurred.

The rule, as moved for on account of misdirection, was re- [\*920 fused: but, on the ground that the verdict was against the weight of evidence, *The Court* made the rule absolute on payment of costs.

(a) See *Wansbrough v. Maton*, 4 A. & E. 884.

**ROBINSON against WARD and Others, Executors of ELIZABETH MARLER. Wednesday, May 6th.**

Assumpsit for use and occupation, work and labour, money lent and money paid, and on an account stated, with a single promise and breach. Several pleas, as to all but 7*l.*, parcel of the moneys in the declaration mentioned: and a single plea, as to 7*l.*, parcel of the moneys in the declaration mentioned, of tender and payment of the sum into court. The pleas did not distinguish the counts. Plaintiff traversed the tender.

*Held*, that proof of a single tender of 7*l.*, in respect of the use and occupation, satisfied the plea of tender.

ASSUMPSIT for 45*l.* 10*s.* owing by the testatrix for use and occupation of certain rooms, &c. by her; 45*l.* 10*s.* for work done and materials provided, and journeys made and taken, for testatrix, and commission due from her in respect thereof; 45*l.* 10*s.* for money lent to testatrix; 45*l.* 10*s.* for money paid for her; and 45*l.* 10*s.* found to be due from her on an account stated. The declaration charged a single promise by testatrix to pay the said several moneys; breach, non-payment by her in her lifetime, or defendants since her death. Damages 100*l.*

Pleas. 1. "As to the supposed promises (*sic*) in the said declaration mentioned, except so far as the same relate to the sum of 7*l.*, parcel of the moneys in the said declaration mentioned," that testatrix did not promise, except as to the said sum of 7*l.*, parcel, &c., in manner, &c.: conclusion to the country. Issue thereon.

2. "And, for a further plea in this respect, except as to the said sum of 7*l.*, parcel, &c.," payment by testatrix: \*verification. Replique: traverse of the payment. Issue thereon.

3. "And the defendants, as to the said sum of 7*l.*, parcel, &c., say that the plaintiff ought not to maintain his aforesaid action thereof against the defendants, to recover any more or greater damages than the said sum of 7*l.*, parcel, &c., in this behalf; because they say that, after the death of the said E. Marler, and after the said E. Marler had promised as to the said sum of 7*l.*, parcel, &c., and before the commencement of this suit, to wit," &c., "defendants, as executors aforesaid, were ready and willing, and then tendered and offered, to pay to the plaintiff the said sum of 7*l.*, parcel, &c., to receive which of the defendants he the plaintiff then wholly refused:" "that the said E. Marler in her lifetime was always ready from the time that she promised as in the declaration mentioned as to the said sum of 7*l.*, parcel, &c., and the defendants, as executors as aforesaid, since her decease have always hitherto been ready, to pay, and still are ready to pay, the plaintiff the said sum of 7*l.*, parcel, &c.: and the defendants, executors as aforesaid, now bring the same into court, ready to be paid to the plaintiff if he will accept the same. And this," &c.: verification. "Wherefore they pray judgment if the plaintiff ought to maintain his aforesaid action against the defendants, executors as aforesaid, to recover any more or greater damages than the said sum of 7*l.*, parcel, &c., in this behalf, &c." Replication: as to the plea



thirdly above pleaded as to the said sum of 7*l.*, parcel, &c. : that plaintiff ought not to be barred from maintaining his aforesaid action thereof against defendants, to recover further damages than the said sum of 7*l.*, parcel, \*&c. ; because he saith that defendants did not tender or offer to plaintiff to pay him the said sum of 7*l.*, parcel, &c., in manner, &c. : conclusion to the country. Issue thereon. [\*922]

4. “ And, for a further plea in this behalf, except as to the said sum of 7*l.*, parcel, &c.,” a set-off for a debt due from plaintiff to testatrix. Replication, denying the debt. Issue thereon.

On the trial, before Lord DENMAN, C. J., at the London sittings after last term, the defendants obtained a verdict on the issues on the first, second and fourth pleas. As to the issue on the third plea, they proved a tender of 7*l.* in respect of the rent of rooms occupied by the testatrix. The plaintiff's counsel objected that, as the tender was pleaded to all the counts, the defendants could not have a verdict upon proof of a single tender. The Lord Chief Justice directed the verdict on this issue to be entered for the plaintiff, giving leave to move to enter a verdict for the defendants.

On an earlier day of this term, *Bramwell* obtained a rule accordingly.

*Mellor* now showed cause.(a) On this record 7*l.* is admitted to be due on each count. Now a tender of 7*l.* only was proved ; and that was made in respect of the sum demanded in the first count. On the third plea, therefore, a claim of 28*l.* remains unanswered ; and the 1st, 2d and 4th pleas are not pleaded to the 7*l.*, in respect of any of the counts. There is no case precisely in point : but it is settled that payment of money \*into court admits that so much is due on every count on which it is paid ; *Archer v. English*, 1 M. & G. 873, 877 ; *Kingham v. Robins*, 5 M. & W. 94, and the argument for the defendant in the latter case. The defendants here ought to have pleaded the tender as to the 7*l.*, parcel of the sum claimed in the first count, and Non assumpsit to the residue of the first count and the whole of the other counts. And the other pleas should have been pleaded with an exception only of the 7*l.* claimed in the first count. This is evident when it is considered that, if a special tender, in respect of the use and occupation, had been pleaded as to 7*l.*, parcel of the moneys in each count, the plea would have been bad. [\*923]

*Bramwell* and *Willis*, contra. The plaintiff admits that, if the tender had been pleaded as to parcel of the moneys in the first count mentioned, the evidence would have supported it. Now the moneys in the first count mentioned are themselves parcel of the moneys in the declaration mentioned. So that the plea, as it now stands, is merely an expansion of the plea framed as supposed. [WIGHTMAN, J. Then to which of the counts is such a plea applicable ?] To any count to which the explanation is applicable : in this instance, to the first. The exceptions in the

(a) Before Lord Denman, C. J., Patteson, Williams, and Wightman, Ja.

other pleas are to be construed in the same way. The defendants say, we have paid 7*l.* of what you claim, and no more is due. *Mee v. Tomlinson*, 4 A. & E. 262, is overruled.<sup>(a)</sup> [PARTESON, J. If there were a \*924] general plea of tender to three special counts, \*the contract in each count would be admitted. *Mellor* mentioned *Bulwer v. Horne*, 4 B. & Ad. 132.] Questions like that now before the court cannot well arise except on the common counts, because on special counts a tender cannot ordinarily be pleaded together with Non assumpsit.

In *Styart v. Rowland*, 1 Show. 215, debt, for 8*l.*, was brought upon an account stated on which defendant was found to be 8*l.* in arrear, and for 10*l.* borrowed by the defendant, *de quibus quidem separalibus denarior' sum'* defendant had satisfied 8*l.*; the plaintiff had a verdict on the account stated, the defendant for the residue: and motion was made in arrest of judgment, because the verdict was repugnant, since "the declaration acknowledged part of both the sums to be received, and consequently part of the 8*l.* to be received, and the jury had found the contrary that there was nothing due on the *mutuatus*, and that the whole 8*l.* in the *insimul computâsset* was due, so that they have found the plaintiff's declaration to be false. But by DOLBIN, J., the exception was too nice. And by HOLT, C. J., the 10*l.*, *if received of any of the two sums, was received out of the several sums.*" The language of the judges in *Kingham v. Robins*, 5 M. & W. 94, shows that the tender admits only a liability upon some one or more contracts, which the plaintiff is bound to prove. Besides, the account stated may be in respect of the use and occupation; and the plaintiff cannot deprive the defendant of his defence by stating the same claim in two ways, proving the one claim only. The damages are laid as an aggregate sum at the end of the declaration: the \*925] tender is in substance pleaded to parcel of the \*damages. *Douglas v. Patrick*, 3 T. R. 683, illustrates the principle that a general tender may be applied to every part of the claim. Payment into court was formerly pleaded to the whole; but now it is pleaded to a part only: the history of this change is given in note (o) to *Birks v. Trippet*, 1 Wms. Saund. 33 g, &c., 6th ed., where *Sharman v. Stevenson*, 2 C., M. & R. 75, 77; S. C. 5 Tyrwh. 564, 566; *Coates v. Stevens*, 2 C., M. & R. 118, 119; S. C. 5 Tyrwh. 764, 755, and *Jourdain v. Johnson*, 2 C., M. & R. 564, 569; S. C. 5 Tyrwh. 524, 531, are referred to.

*Cur. adv. vult.*

Lord DENMAN, C. J., on the following day, (May 7th,) delivered the judgment of the court.

We are of opinion that the tender was well proved, and satisfied the allegations of the third plea. The rule for entering a verdict for the defendants on the issue upon that plea will therefore be made absolute.

Rule absolute.

(a) *Mitchell v. Townley*, 7 A. & E. 164. *Bright v. Beard*, 4 Q. B. 832, 837.

**\*The QUEEN against The Mayor and Town Council of [926  
WARWICK. Wednesday, May 6th.**

Under stat. 5 & 6 W. 4, c. 76, ss. 66, 67, a corporation executed a bond for payment of an annuity to a person removed from office, and also for payment, on demand, of arrears due before the date. The obligee consenting not to press for the arrears, the council passed a resolution to pay him interest thereon. *Held*, that such resolution, and orders of the council for payment of the interest, were unsanctioned by s. 92, and were liable to be quashed on being brought up by certiorari.

And, per Patteson, J., that, independently of this objection, the resolution, not being under seal, could not bind the corporation.

The corporation had, during all the time of living memory, repaired from the corporation funds a pew in a parish church to which the members of the corporation had been used, in their character of corporators, to resort for worship. It did not appear that the corporation possessed any hall or other building within the parish. *Held*, that such repairs might be defrayed from time to time under sect. 92.

MELLOR, in Michaelmas term, 1845, obtained a rule calling on the council of the borough of Warwick, to show cause why a certiorari should not issue, to remove into this court certain orders or resolutions made by the council on 10th November, 1845, whereby it was resolved that certain sums of money should be paid; among others, (a) the sum of 8*l.* to Mr. James Tibbits, for half a year's interest on a bond, due 16th August, 1845; and 30*l.* 19*s.* 11*d.* to John Palmer, "for relining the pew;" also two several orders for the payment of these sums, made on the treasurer of the borough.

It appeared that the council had passed a resolution, (which was not shown to be under seal,) that Mr. Tibbits should be paid interest at 5*l.* per cent. "on the sum of 320*l.* mentioned in his compensation bond, executed by the council on the 16th August, 1843, from the date thereof until payment." That the bond was executed to secure to Mr. Tibbits the sum of 77*l.* 5*s.* 8*d.* per annum for life as compensation for the loss of certain offices, (b) and also the sum of 320*l.*, arrears on such annuity from the time of his dismissal from office until the date of the bond. [927 By the condition of the bond, the 320*l.* was payable on demand; and it did not appear that the bond stipulated for payment of interest. Mr. Tibbits deposed, in opposition to the rule, that the council had resolved, on his consenting not to press for immediate payment of the 320*l.*, to allow the said interest thereon; and that the resolution passed accordingly on 6th August, 1844.

The other resolution was for the lining of a pew, in the High Church in the parish of St. Mary, Warwick, with cloth; the pew being used by such members of the Town Council as belonged to the established church. It was sworn, in opposition to the rule, that it had been always the usage for the mayor and several of the aldermen and principal members of the corporation to go together in procession to this church on every Sunday that the pew had always been occupied by the corporation without pay

(a) See note at the end of this case.

(b) See *Regina v. The Corporation of Warwick*, 10. A. & E. 386.

ment of rent, and in the memory of deponents had always been lined in this manner: and that it had always been repaired by the corporation, out of its funds.

Sir *F. Thesiger*, Attorney-General, *Whitehurst* and *G. Hayes*, now showed cause. Both payments are justified by sect. 92 of stat. 5 & 6 W. 4, c. 76, as "necessarily incurred in carrying into effect the provisions of this act." The corporation were compelled to give the bond, under sects. 66, 67. It will be argued that, as the bond contains no stipulation for the payment of interest, the effect of this payment would be to throw expense on persons who were not properly liable. But, if a corporation be without funds enabling them to make a payment, they may reasonably \*928] purchase forbearance \*by giving interest. The case is not like that of an unauthorized borrowing of money, as in *Regina v. The Council of Lichfield*, 4 Q. B. 893. With respect to the pew, the corporation had the same right to repair it as to incur the expense of glazing a broken window in a house belonging to them.

Sir *F. Kelly*, Solicitor-General, and *Mellor*, contra. The interest on the bond was, no doubt, allowed in order to purchase forbearance; but the corporation had no right to delay the payment at all. They would thus throw the burden of a debt, payable at once, on future members of the corporation, and, in effect, would be borrowing the money. As to the pew, it is not, legally speaking, the property of the corporation. Pews, not in the chancel, (which this pew is not stated to be,) can be the property of parties only by a faculty or by prescription in right of a messuage. No faculty is set up: and, as for a prescription, it is not even suggested that the town hall is in the parish of St. Mary: the corporators are not properly residents. The authorities are collected in *Byerley v. Windus*, 5 B. & C. 1.(a) Could a corporation pay for accommodation in a dissenting meeting-house out of the corporation funds? The general policy of the act was to put an end to disputes arising out of religious distinctions: this appears by sect. 68, which continues certain stipends of religious ministers, thereby showing that, in default of express provision, no analogous payment can be supported.

Lord DENMAN, C. J. I think the statute gives no authority to pay interest on such bonds as this. \*929] \*Compensation is to be assessed, and the amount to be secured by a bond. The arrears are to be paid on demand. If the town council for the time being wish to postpone this payment, they must do so by some arrangement among themselves: they cannot throw the payment of interest on future members of the corporation. As to the pew, I think the repairs may be considered as done essentially for the corporation, just as if, not having a town hall, they had hired a room for their meetings. They may have no particular interest or property in the pew; yet the mere habit of attending the church will well authorize such an expense.

(a) See *Mainwaring v. Giles*, 5 B. & Ald. 356.

PATTESON, J. The 320*l.* was payable on demand. Mr. Tibbits, it not being convenient to pay him the sum immediately, consents not to press his demand, if he is paid interest. But such a payment of interest is not within the statute: nor, again, could such a contract, not being under seal, bind the corporation. As to the lining of the pew, the objection seems at any rate a hard one. But we must give a liberal interpretation to the 92*d* section. It expressly sanctions expenditure upon "corporate buildings," which would fairly include buildings in the possession of the corporation, whether held under a strict legal title or not. Even without express words, I think the repair of such buildings would fall within the head of expenses "necessarily incurred" in carrying the act into effect: and the same principle applies to a pew occupied by the members of the corporation.

WILLIAMS, J. I think no bargain could be made for the interest, which could legitimately bind the corporation funds. As to the repairs of the pew, I quite agree with \*the rest of the court. The pew has for a long while been constantly used by the members of the corporation, and repaired from the corporation funds: and it is consistent with decorum that the corporation should have the occupation of a pew for the purpose stated. [\*930]

WIGHTMAN, J. The 8*l.* is not an expense "necessarily incurred" in carrying the act into execution: indeed it is a payment which rather contravenes the act, under which the payment was ordered to be made simpliciter. As to the lining of the pew, I think a liberal construction of sect. 92 may include that expense.

Rule absolute as to the 8*l.*: discharged, as to the 30*l.* 19*s.* 11*d.*(a)

(a) The rule had been obtained also for bringing up another resolution and order for the payment of expenses incurred in a Chancery suit, respecting some trust property. The court made the rule absolute as to this sum. But afterwards, in Trinity term, (May 27*th*,) 1847, in the case of *Regina v. Collins*, cause was shown against quashing this last-mentioned resolution and order: and, it appearing that the material point had not been fully before the court in the case reported in the text, but that the question as to the interest of the corporation in the property was still undecided in the Chancery proceedings, the court, (PATTESON, WIGHTMAN and ERLE, J*s.*,) after hearing *Whitehurst* and *G. Hayes* against the rule, and Sir *F. Kelly* and *Mellor* in support of it, directed the case to stand over till the determination of the question in Chancery. The resolution and order for the payment of the 8*l.* were not defended. In Trinity term, (10*th* June,) 1848, *Mellor* moved to make the rule for quashing the order and resolution as to expenses in Chancery absolute, stating that the Lord Chancellor had decided against the claim of the corporation, that notice of this motion had been given to the town clerk, and that no counsel was instructed to oppose the motion. *The Court* [Lord DENMAN, C. J., PATTESON, WIGHTMAN, and ERLE, J*s.*] said that no further statement was necessary, and made the rule absolute in the first instance, with costs.

\*931] \*ALEXANDER against WILLIAMS. *Thursday, May 7th.*

Since the General Rule, Trin. 4 Vict., when a judge certifies, under stat. 1 W. 4, c. 7, s. 2, for immediate execution, the plaintiff may sign judgment and take out execution, not only without a four day rule, but without any delay.

THIS action, on a bill of exchange, was tried at the sittings in London after last Michaelmas term, December 17th, and a verdict found for the plaintiff. The Lord Chief Justice certified for immediate execution. On the same day the plaintiff gave notice of taxing costs; and, on the 18th, the costs were taxed, judgment signed, and execution issued and executed. The attorneys on both sides attended the taxation. A summons was taken out, calling on the plaintiff to show cause why the judgment and subsequent proceedings should not be set aside for irregularity: But COLERIDGE, J., after hearing the parties, and having taken time for consideration, declined to make an order. *Lush*, in last term, obtained a rule to show cause why the judgment and all subsequent proceedings thereon should not be set aside for irregularity with costs.

*Watson* now showed cause. (a) The ground of motion is, that, although the judge certified, under stat. 1 W. 4, c. 7, s. 2, that execution ought to issue forthwith, and although the rule for judgment, required by that clause, is dispensed with by Reg. Gen. Trin. 4 Vict., 1 Q. B. 699, yet the plaintiff was bound to defer issuing execution for four days, as he must have done if a rule for judgment had still been requisite. But the  
 \*932] plain \*meaning of the rule of court is, that that which the judgment requires shall be done at once. *Snooks v. Smith*, 7 Man. & G. 528, S. C. 8 Scott's New Rep. 273, will be cited on the other side. There, the judge having certified at the sittings that execution should issue forthwith, counsel, on the same day, moved, in Banc, for leave to sign judgment, alleging that, if it were not granted, the certificate would be of no avail, as the defendant's goods were to be sold on the following day: and TINDAL, J. C., said: "The order for speedy execution does not (though the rule for judgment, which was a four day rule, is no longer necessary—Reg. Gen. Hilary Term, 2 Will. 4, r. 67, (b) deprive the defendant of his right to come within the four days and ask for a new trial." (c) [Lord DENMAN, C. J. That is not inconsistent with the plaintiff's signing judgment and issuing execution.] The defendant may still have a new trial. *Nichols v. Chambers*, 1 Cro., M. & R. 385, S. C. 4 Tyrwh. 836, under stat. 3 & 4 W. 4, c. 42, s. 18, sanctions the construction acted upon in the present case. The defendant here attended the taxation of costs. [Lord DENMAN, C. J. There is not much in that.]

*Lush*, contra. At common law it was necessary to enter a rule for judgment, which expired in four days exclusive: 2 Tidd, 903, (9th ed.) Reg.

(a) Before Lord Denman, C. J., and Patteson, J. Coleridge, J., was unwell; Wightman, J., in the Bail Court; Williams, J., at Guildhall. (b) 3 B. & Ad. 383.

(c) This was cited from 8 Scott, N. R. 273. See 7 Man. & G. 528.



Gen. Hil. 2 W. 4, I. 67, dispensed merely with the rule; it did not accelerate the judgment. Stat. 1 W. 4, c. 7, s. 2, after giving the judge power to certify for immediate execution, adds: "in all which cases a rule for judgment \*may be given, costs taxed, and judgment signed forthwith, and execution may issue forthwith, or afterwards, according to the terms of such certificate, on any day in vacation or term." This obviously puts a plaintiff trying at the assizes in the same position as if he had tried in term, and in effect makes the distringas returnable forthwith instead of on the first day of the ensuing term. It authorizes the proceedings towards judgment to be taken at once, but does not otherwise interfere with the existing practice: and it was decided in *The Governors of the Poor of Exeter v. Sivell*, 7 Dowl. P. C. 624, that Reg. Gen. Hil. 2 W. 4, I. 67,(a) applied only to cases where judgment was signed after the return of the distringas, and that in a case of certificate at the assizes for speedy execution, a rule for judgment must still be given in this court. Then, by Reg. Gen. Trin. 4 Vict., 1 Q. B. 699, "It is ordered that, where judgment is signed by virtue of a judge's certificate given pursuant to the act 1 W. 4, c. 7, s. 2, such judgment may be signed *without any rule for judgment*." That only dispenses with the rule; and the four days must still be given. Any other construction would place a plaintiff who tries out of term in a better situation than one who tries in term, and, instead of assimilating, would vary the practice in the two cases. In *Snooks v. Smith*, 7 Man. & G. 528, S. C. 8 Scott's New Rep. 273, TINDAL, C. J., evidently thought that execution could not at any rate issue within the four days.

*The Court* took time to confer with the other judges.

*Cur. adv. vult.*

\*Lord DENMAN, J. C., in the ensuing vacation, (May 9th,) said: The rule must be discharged. Rule discharged. [\*934]

(a) 3 B. & Ad. 383.

### DOE on the several Demises of MICHAEL MERIGAN and MICHAEL DALY against ROSINA DALY.

The nominal plaintiff in ejectment may recover against a married woman who has entered into the common consent rule, though it appear on the trial that the lessor of the plaintiff is, and was at the time of the demise laid in the declaration, the defendant's husband.

EJECTMENT for a messuage, &c. in the parish of Isleworth, Middlesex. On the trial, before WIGHTMAN, J., at the Middlesex sittings after last term, evidence was given of a title in Michael Daly: and it appeared that Michael and Rosina Daly were husband and wife; that, for some time after their marriage, they inhabited the house in question together; that Michael Daly then left it, and the defendant Rosina continued in possession down to the time of the alleged demise by Michael Daly, (Sep-

tember 1st, 1845 ;) and that she, at that period, and until the action was brought, held the premises against the will of Michael. The usual consent rule had been entered into. It did not appear that any demand had been made on the part of Michael, to have possession before September 1st, 1845. WIGHTMAN, J., left it to the jury to say whether they were satisfied that Michael Daly and the defendant were husband and wife ; which question the jury answered in the affirmative, and found a verdict for the plaintiff on the demise of Daly ; for the defendant on that of Merigan.

*Bramwell*, in this term, moved for a new trial, on the ground that a woman could not be made defendant in an ejectment for occupying  
 \*935] premises which belonged to \*her husband. He also objected that no demand of possession had been made before Daly's demise. [WIGHTMAN, J. I think that point was not made at the trial.] A rule nisi was granted ; the case not to be set down in the New Trial paper.

*Petersdorff* now showed cause.(a) The defendant raised this objection too late, after having entered into the common consent rule, by which she admitted herself to be tenant and undertook to appear and plead Not Guilty. If a motion had been made before trial, the court might have modified the consent rule ; and then the defendant might have pleaded specially, as was done in *ejectione firmæ* in *Peytoe's Case*, 9 Rep. 77 b, and in ejectment in *Philips v. Bury*, Carth. 180, or as in cases where the defendant in ejectment has been allowed to plead in abatement. A woman sued in trespass or case, and pleading Not guilty, could not allege that she was the wife of the plaintiff. But, further, in an action of ejectment it is not, correctly speaking, the lessor of the plaintiff who sues ; John Doe is the plaintiff : and on this ground it has been held that, in such an action, lessors of plaintiff by several demises could not be heard by separate counsel ; *Doe dem. Fox v. Bromley*, 6 Dowl. & R. 292, 294. The general proposition, that a husband cannot bring an action against his wife, need not be questioned : but the wife may, under particular circumstances, appear in an action in a character substantially distinct from that  
 \*936] of her husband ; and in such cases it has been held that \*steps in the cause may be taken against her, for his security ; as where the wife has sued in her husband's name, and terms have been imposed for his indemnification ; *Morgan v. Thomas*, 2 Cro. & M. 388 ; *Harrison v. Almond*, 4 Dowl. P. C. 321. Then, the only question in an ejectment being whether the lessor of the plaintiff has title, a lessor claiming under the husband must have title as against the wife.

*Bramwell*, contrà. It is no answer to this motion that a summary application might have been made to alter the consent rule. A motion for a new trial is the substitute for a bill of exceptions ; and a bill of exceptions could not have been defeated by alleging that the court might have been called upon at an earlier period to amend the consent rule.

(a) Before Lord Denman, C. J., and Patteson, J. See p. 931, note (a) ante.

According to the argument for the plaintiff, any married woman living on the premises of her husband would be legally liable to an ejectment at his suit. It is true that John Doe is, nominally, the plaintiff; but to this, as to other fictions of law, the maxim must be applied "that no fiction shall extend to work an injury; its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law. So true it is, that *in fictione juris semper subsistit æquitas*." 3 Bla. Com. 43. And the real supposition in an ejectment is that the defendant is a trespasser as against the lessor of the plaintiff. The wife, here, who came upon the premises to reside with her husband, could not be a trespasser as against him, though she continued there against his will. She might be a wrongdoer in a moral point of view, as by disobedience; but she was guilty of no act for which the law \*provides a remedy. In *Rex v. Smyth*, 1 M. & Rob. 155, Lord TENTERDEN [\*937] was inclined to think that a wife, coming upon her husband's premises "with strong hand," might "be indictable for a forcible entry, which proceeds on the breach of the public peace;" but he said that "a wife certainly cannot commit a trespass on the property of her husband." In a case like this, the wife's possession is not unlawful, but for the lease to John Doe: and, if he is to be treated as a real person for the purpose of constituting this illegality, it is requisite, as in the case of other real persons, that he should have demanded possession, or in some other manner determined the defendant's holding; and, for want of such demand or other proceeding, the action must fail; *Right v. Beard*, 13 East, 210; *Doe dem. Newby v. Jackson*, 1 B. & C. 448.

*Cur. adv. vult.*

Lord DENMAN, C. J., in the ensuing vacation, (May 11th,) delivered the judgment of the court.

A motion was made for a new trial, on the ground that the verdict obtained for the plaintiff could not be maintained because it was proved at the trial that the defendant was the wife of one of the lessors of the plaintiff.

We do not see how this defendant can avoid the effect of the consent rule, which puts in issue nothing but her title. It is said that there is such common interest of husband and wife in his property that she cannot by law be guilty of a trespass upon it. We cannot accede to this doctrine, as applicable to an \*ejectment; for the relation of husband and wife certainly does not justify her in taking forcible possession of his property to his exclusion. [\*938]

There are technical difficulties in an adverse proceeding between married persons, which are raised for the purpose of defeating justice by restoring to the owner land unlawfully withheld from him. But this attempt is successfully met by a technical answer; for John Doe, claiming under a demise from the husband, and not the husband himself, is the plaintiff on the record.

Some question was made of the necessity of a demand of possession : but we have seen the learned judge, and find no circumstance that could require it. Rule discharged.

PAXTON against The GREAT NORTH of ENGLAND Railway Company. *Thursday, May 7th.*

Where a cause, and all matters of difference in the cause, only, are referred by order of Nisi Prius, the verdict being ordered to stand for a sum named, subject to the award, and the award is that the verdict shall stand for a certain sum, an application to set the award aside must be made within four days of notice being given that the award is made, unless some excuse for delay be shown, such as would, in the case of a verdict, induce the court to allow a motion for a new trial after the expiration of the usual four days.

The same rule was held applicable where the arbitrator was directed to state for the opinion of the court such points of law as the parties should raise, and he awarded a verdict for the plaintiff, unless the court should otherwise order, for a sum named, stating points, and directing that the verdict should be reduced or increased, or a verdict be entered for the defendant on certain issues, according to the decision of the court; and the defendant afterwards moved to set the award aside, or to enter a verdict for the defendant on some or all of the issues, upon matter apparent on the face of the award.

DEBT for work and labour performed, and materials, &c., provided for defendants by plaintiff, hire of divers horses and carriages, &c., and tools, &c., for horses, &c., sold and delivered, money paid, and on an account stated.

\*939] \*Pleas. 1. Except as to 1300*l.*, Nunquam indebitatus. Issue thereon. 2. Except as before, payment. Replication traversing the payment. Issue thereon. 3. Except as before, a set-off. Replication denying that plaintiff was indebted. Issue thereon. 4. As to 1300*l.*, payment into court, which the plaintiff accepted.

On the trial, at the Yorkshire Summer Assizes, 1842, it was ordered by the court that there should be a verdict for the plaintiff for 250,000*l.* debt, 1*s.* damages, and 40*s.* costs, subject to the award of a barrister, "to whom all matters in difference in this cause be, and the same are hereby, referred;" "and that, if the said arbitrator shall so order, a verdict for the plaintiff, or a nonsuit, or verdict for the defendant, shall be entered, as he shall direct." "And it is also ordered, by and with such consent as aforesaid, that the said arbitrator shall state, on the face of his award, such points of law, for the opinion and decision of the Court of Queen's Bench thereon, as either of the said parties may raise and require him so to state."

The arbitrator made his award, which he stated that he did thereby make and publish, and to which it was therein stated that he set his hand on the 13th November, 1844. He awarded as follows. "I do award that, unless the Court of Queen's Bench shall otherwise order, the verdict already entered for the plaintiff in this cause shall stand; but that the same shall be reduced to 432*l.* 6*s.* 9*d.* debt, and 1*s.* damages, and 40*s.* costs. And I determine for the plaintiff every issue joined in this cause."

“ And, whereas I have been required by the plaintiff and the defendants, respectively, according to the provision in that behalf contained in the above-mentioned order, to state certain points of \*law for the opi- [\*940  
 nion of the said Court of Queen’s Bench, I do now proceed to  
 state all such of the said points of law as the evidence before me is capa-  
 ble of raising, in manner following; that is to say: The first point which  
 I am required by the defendants to raise is, &c.” The award then set  
 out the several points raised by the parties on each side, and found facts  
 as to each, and it concluded as follows: “ And I do further award that,  
 if the court shall be of opinion that any of the items which I have ad-  
 mitted to the credit of the said plaintiff or the said defendants, respec-  
 tively, ought to be disallowed, or that any of the items which I have dis-  
 allowed to the plaintiff and the defendants, respectively, ought to be ad-  
 mitted, and if the balance resulting from such corrected items in favour  
 of the plaintiff shall exceed, or shall, save as after mentioned, fall short  
 of the sum of 432*l.* 6*s.* 9*d.*, at which sum I have assessed the debt due  
 to the plaintiff as aforesaid, then I do award that the verdict already en-  
 tered for the plaintiff shall stand; but that the same shall be reduced to  
 such amount of debt as, in the opinion of the court, shall be due to the  
 plaintiff, with 1*s.* damages, instead of the amount of debt which I have  
 awarded. But, if the court shall be of opinion, upon the point first  
 raised, that this action is not maintainable for more than the sum paid  
 into court, or if the balance adjudged to be due to the plaintiff upon such  
 corrected items shall be reduced by a sum larger than or equal to the  
 said sum of 432*l.* 6*s.* 9*d.*, then I do award that the general verdict entered  
 for the plaintiff shall be set aside, and that a verdict shall be entered for  
 the plaintiff on the first and for the defendants on the second and third  
 issues. In witness,” &c.

\*On 14th January, 1845, the order of reference was, according [\*941  
 to a provision therein entered, made a rule of court; and, on the  
 following day, *Kelly* obtained a rule calling on the plaintiff to show cause.

Why the awards should not be set aside, on the grounds: 1. That  
 the arbitrator has not sufficiently raised upon the award the several ques-  
 tions he was requested to raise by the respective parties. 2. That the  
 award is inconsistent in awarding that the verdict is to be entered for the  
 plaintiff on the first issue, notwithstanding the court may be of opinion  
 that the action is not maintainable for more than the money paid into  
 court.

Or why the verdict for the plaintiff should not be set aside, and a ver-  
 dict entered for the defendants on the second and third issues, on the  
 ground that it appears by the award, &c., (relying on points specially  
 raised in the award.)

Or why the verdict should not be entered for the defendants on all the  
 issues, or on the second and third issues, on the ground that the action,  
 being in debt on the *indebitatus* counts, was not maintainable for more

than the money paid into court, because, &c., (relying on a point specially raised in the award.)

In support of this rule, the attorney for the defendants made affidavit that the award "was not published until the 13th day of November last," (1845,) "and that neither the said defendants nor this deponent, as their attorney, received any notification of such publication until the 16th day of the same month of November." "That there was a meeting of the board of directors of the said company, who manage the concerns thereof, \*942] on the 12th day of the said month of \*November, but no other meeting of the said board of directors took place until the 26th day of the same month of November; by reason whereof this deponent was not able to obtain the consent of the said board to take up the said award." And "that the said award was subsequently taken up by the above-named plaintiff; and the above-named defendants could not be prepared to move this honourable court in the matter of the said award during last Michaelmas term."

*Martin, Granger, and Rew* now showed cause. The application is too late. Where a reference is not only of the cause, but of all matters in difference, the court follows the limitation of time given, by stat. 9 & 10 W. 3, c. 15, s. 2, in the case of an award under a submission by rule of court, and allows the whole term next after the publication of the award for the application. That is the rule laid down in *Allenby v. Proudlock*, 4 Dowl. P. C. 54. But COLERIDGE, J., distinguished that case from one like the present, where the reference is of the cause only; and he admitted that in the latter case the rule would be as in the case of a verdict, and the application must be within four days. The same view was adopted by LITLEDALE and COLERIDGE, Js., in *Hayward v. Phillips*, 6 A. & E. 119, and by this court in *Moore v. Butlin*, 7 A. & E. 595, 599. The law has been considered to be so ever since, and is laid down accordingly in Lush's Practice, 861, and 2 Chitty's Archbold, 1503, (8th edition.) If the court would exercise a discretion, still no facts are shown here to justify a departure from the ordinary rule.

\*943] \*Sir F. Kelly, Solicitor-General, and Joseph Addison, contra. The rule contended for on the other side has never been expressly decided upon: the authorities cited contain merely extrajudicial dicta, the actual decisions having been in cases where a longer time was allowed. In cases under stat. 9 & 10 W. 3, c. 15, s. 2, the court is of course limited to the time there allowed. But here the case is like that of a verdict; and the court is not, any more than on motions for a new trial, bound to any rule; though the discretion is indeed usually exercised, as to motions for new trials, by requiring the motion to be made in four days. [Lord DENMAN, C. J. We go farther than that: we generally hold ourselves bound not to receive a motion for a new trial after the four days unless something equivalent to a motion has taken place within the



four days.] If such a practice be applied to awards, the rule will in reality be stricter than in the case of a verdict: for, where, an award is published in term time, only four days will be allowed, whereas, if a verdict be given in term time, four days are allowed from the return of the distringas. Further, the objection to the award arises here on the face of it: and, in that respect, it would seem from the language of LITTLEDALE, J., in *Mortin v. Burge*, 4 A. & E. 973, 974, that a distinction is recognised in practice. But, again, this is not the case of substituting the arbitrator for a jury: and therefore the court will, as in *Macarthur v. Campbell*, 5 B. & Ad. 518, adopt the rule of stat. 9 & 10 W. 3, c. 15, s. 2. Here the arbitrator had to state facts for the opinion of the court, and did state them: the award was therefore conditional only, and \*not [\*944 complete before the judgment of the court on the facts stated should be given. [PATTESON, J. *Anderson v. Fuller*, 4 M. & W. 470, is an express decision that the circumstance of an award being subject to the opinion of the court makes no difference, and that the time is still to be reckoned from the publication of the arbitrator's award.] There is this difference, that the plaintiff here could not have signed judgment without applying to the court, as he might have done in the case of an unconditional award.(a) PATTESON, J. The award is for the plaintiff in the first instance: you do not apply in time to get rid of it. Lord DENMAN, C. J. You are begging the question. The plaintiff would insist upon entering up judgment in default of an application from you.] The defendant had no notice of the award till the day after its publication. There was not time to procure the necessary affidavits in the four days: and, besides, the authority of the directors could not be obtained.

Lord DENMAN, C. J. It is quite clear that there must be some rule of limitation: and the rule for which the plaintiff contends is part of the known practice of the court. From 1835, when my brother COLERIDGE recognised the general rule, (b) to the present time, it has always been taken for granted. Then *Anderson v. Fuller* is an express decision that the time runs, in \*such a case as this, from the publication of the award. That case has not been distinguished from the present. [\*945 Mr. Addison treats this as if it were a special case and not a perfect award; and he contends that there could be no judgment entered without an application to the court. But could there not? That argument would be as good ten years hence as now. What does the arbitrator direct? A verdict for the plaintiff, though the subsequent part of the award gives an opportunity of altering it. As to the difficulty of obtaining affidavits in time, the same argument might be urged in the case of a motion for a

(a) See *Lee v. Lingard*, 1 East, 401; *Borrowdale v. Hitcheney*, 3 B. & P. 244. In the present case, a rule Nisi had been in fact obtained, on behalf of the plaintiff, by Rew, (on the same day as that on which the rule for the defendants was obtained,) to enter all the issues for the plaintiff for a sum including certain items claimed by him, but disallowed by the arbitrator, as appeared by the award.

(b) *Allenby v. Proudlock*, 4 Dowl. P. C. 54.

new trial. I would add that we should not reckon the time from what is sometimes called the publication of the award, unless the parties have actual notice that the award is made. That was the view adopted in *Macarthur v. Campbell*: and, so understood, I think the general rule a very reasonable one.

PATTESON, J. *Anderson v. Fuller* shows that, when the verdict is to stand unless the court otherwise order, an application to the court to order the verdict to be altered is like a motion to set the award aside. Whose business is it to make the application? Not that of the party in whose favour it is made. It is clear that, on this award, the plaintiff might enter his judgment for the sum awarded, unless some steps were taken, which step therefore must be taken by the defendant; and as the court of Exchequer held in *Anderson v. Fuller*, that step must be in the nature of a motion to set aside the award. Then comes the question, how much \*946] time is to be allowed for such a motion. The distinction is, \*between a reference of the cause and all matters in difference, and a reference of the cause only; in the latter case, which this turns out to be, the rule is more strict, by analogy, in some measure, to a verdict. The motion must therefore be made within the four days. I do not say that if the defendants here had come a day or two later, and had assigned a reasonable cause for the delay, they might not have induced the court to allow the application. A similar latitude is sometimes given in the case of a verdict. But here all we see is, that the directors did not choose to have an extraordinary meeting.(a) Rule discharged.

(a) No other judge was present. See p. 931, note (a) ante.

### The QUEEN against MOUSLEY, Clerk.

P., by will, directed that six poor persons of E. parish should have a weekly allowance and lodging in an almshouse to be built in E.; and he devised lands to trustees, out of which the expense was to be defrayed, and also on condition that the trustees should find a person qualified to keep a free grammar school in E. or in R.; and the will gave directions concerning the rule of the school, and the putting in and paying the schoolmaster and usher.

Afterwards, by charter, reciting the will, and that there had been built an hospital at E, in which poor persons were relieved, and a free school at R., it was granted that there should be in E. an hospital, and in R. a free grammar school, the said hospital and school to consist of a master, a schoolmaster, ushers, poor men, and poor scholars, who were made a corporation; that there should be governors, with power to correct abuses and make laws for the governing of the corporation, and their lands and goods; that the master should be a Master of Arts of Oxford or Cambridge, and a preacher of God's word, and should, in person or by deputy, preach once every Sunday in the parish church of E., and read prayers twice every day in the week in that church.

By act of parliament (5 G. 4, c. 38, private) it was enacted that the affairs of the corporation, without prejudice to the powers and privileges of the governors, should be managed by a court of managers, consisting of certain members of the corporation. And it was provided that, when any of the governors should be a minor or under legal disability, the guardian, &c., of such governor should act in his stead.

*Held*: that the mastership was not an office for which an information in the nature of a *quo warranto* would lie.

SIR F. THESIGER, Solicitor-General, in Trinity term, 1844, obtained a rule calling upon the defendant to show cause why a quo warranto information should not \*be exhibited against him to show by what authority he claimed to be Master of the Hospital and Free School [\*947 of Sir John Port, knight, in Etwall and Repton, (otherwise Reppington,) of the foundation of the said Sir John Port, knight: upon the grounds, that he was not duly elected or appointed master, that his appointment was improperly obtained, and on other grounds (stated in the rule) setting forth objections to the appointment more specifically.

The only affidavits bearing upon the point decided by the court explained the constitution of the school and the nature of the office of master. The material parts of these (which were among the affidavits filed in support of the rule) were in substance as follows.

Sir John Port, of Etwall, in the county of Derby, knight, by his will, dated 9th March, 1556, directed that six of the poorest of Etwall parish should have weekly for ever twenty pence a piece, besides lodging in an almshouse to be built near the churchyard of Etwall, and that the money so to be paid to the poor aforesaid should be received out of the lands and tenements thereafter mentioned: and the testator devised various estates to trustees upon condition to find a person qualified as in the will mentioned, freely to keep a grammar school in Etwall aforesaid, or Repton in the said county; and he gave directions concerning the master and usher and their salaries; also concerning the rule of the said school and the putting in of the said schoolmaster and usher.

By charter, dated 12th June, 19 Ja. 1, after reciting (inter alia) that, in accomplishment of some part of the said will, a hospital had been built at Etwall, in which six poor people had for many years been maintained and relieved, and that a free school had been built at \*Repton: it was granted that for ever thereafter there should be within the said [\*948 parish of Etwall one hospital for the maintenance of poor people, and within the parish of Repton one free grammar school, which were to be called the hospital, &c., (as recited in the rule, *suprà*;) and the said hospital and school were to consist of one master, one schoolmaster, two ushers, twelve poor men, and four poor scholars; and they and their successors were constituted one body corporate and politic in deed and in name by the name of master, schoolmaster, ushers, poor men, and poor scholars of the hospital and free school of Sir John Port, knight, in Etwall and Repton, alias Reppington, of the foundation of the said Sir John Port: and, in order that the revenues of the charity might be carefully disposed, it was by the said charter ordained that there should be one or more governors of the hospital and school, who should have power to correct and reform such abuses as should happen in the said master, schoolmaster, ushers, poor men, and poor scholars, [in the governing, ordering, and disposing of themselves, or of, their lands, tenements, or revenues, according to the ordinances thereunto annexed, and such other constitutions as

should thereafter be made,] (a) and to make laws for the well governing of the said master, &c., and poor scholars, and of their lands, tenements, hereditaments, goods, and chattels. And it was ordained that, after the decease of Sir John Harpur, knight, (who was thereby appointed the first and then present governor and superintendent of the said hospital and \*949] free school,) Henry Earl of Huntington, Philip \*Lord Stanhope, and Sir Thomas Gerard, and their several heirs for ever, should be governors and superintendents of the said hospital and school, with power for them and their several heirs, or the greater number of them, (after the decease of the said John Harpur,) to elect, nominate, and appoint any fit person or persons to be master of the said hospital, and schoolmaster and ushers of the said school. [Among the ordinances annexed to the charter was the following: (b) “That the master of the said hospital should be a master of arts at least of one of the universities of Oxford or Cambridge, and a preacher of God’s holy word; that the said master should preach every Sunday once in the parish church of Etwall aforesaid,” (except he should procure an able person to preach in his stead,) “and that he should twice every day in the week say common prayers in the said church,” “to the said poor and others that would hear the same.”]

By an act of parliament passed, &c., (5 G. 4, c. 38, private,) for regulating the said hospital and free school, entitled “An act to empower the governors and corporation of Etwall hospital and Repton free school, in the county of Derby, to extend and increase the objects of that charity, and to make sales, and for other purposes therein mentioned;” it was amongst other things recited that Francis Rawdon Marquis of Hastings, George Earl of Chesterfield, (an infant of the age of 19 years or thereabouts,) and Sir William Gerard, Bart., were the respective heirs at law of the said Henry Earl of Huntington, Philip Lord Stanhope, and Sir Thomas Gerard, Bart., named in the said charter, and, as such, were the \*950] hereditary and acting governors of the said hospital and \*free school. And it was enacted, (sect. 19:) That all the affairs and concerns of the master, schoolmaster, ushers, poor men, and poor scholars, of the said hospital and free school, and their successors, and all matters and things relating to their possessions and revenues, shall, without prejudice to the powers and privileges of the governors for the time being of the said hospital and free school, be from time to time managed, transacted and conducted at a general meeting to be called the court of managers, the members whereof shall consist of the master, schoolmaster, and ushers, for the time being, of the said hospital and free school, and the three ancientest poor men for the time being of the said hospital, and the court of managers shall be held at Repton otherwise Reppington afore-

(a) The words between brackets are in the charter, as recited in the preamble of the act, 5 G. 4, c. 38, (private,) after mentioned, but were not given in the affidavit.

(b) This is recited in the preamble of the after-mentioned act, 5 G. 4, c. 38, as one of the ordinances so annexed; but it was not set out in the affidavits.

said, and shall be called at any time by the master for the time being of the said hospital, he giving seven days' notice, &c., and such of the members of the said court as shall be assembled at any one court, or the major part of them so assembled, shall be competent to transact all the business for the transaction of which such court shall be called. Sect. 20 enacts that, in case any heir of the Earl of Huntingdon, Lord Stanhope, or Sir T. Gerard, shall be a minor, or under legal disability, the guardian, husband, &c., shall act as governor of the hospital and free school, and exercise all the powers of a governor on behalf of such minor, &c.

The case was argued in Hilary and Trinity terms, 1845.(a)

\**Kelly, Clarke, Serjt., and Peacock* showed cause. This is not an office for which an information in the nature of a quo warranto will lie. Neither the crown nor the public is interested in this franchise, if it be a franchise at all. There is merely a charitable bequest carried out by certain machinery regulated by a charter and a private act of parliament. Informations under stat. 9 Ann. c. 20, s. 4, issue only in the cases enumerated in the preamble to sect. 1: and this office cannot be said to fall under the head of "other offices, within cities, towns corporate, boroughs and places." The cases on this subject are collected in 2 Selw. N. P. 1145, &c. 10th ed., (p. 1157, &c., of 11th ed.) In *Rex v. Ogden*, 10 B. & C. 230, 233, BAYLEY, J., said: "There is no instance of a quo warranto information having been granted by leave of the court against persons for usurping a franchise of a mere private nature, not connected with public government." In *Rex v. Ramsden*, 3 A. & E. 456, and *Rex v. Hanley*, 3 A. & E. 463, note b, the information was refused in the case of offices much more nearly public than this. The former decision overrules *Rex v. Beedle*, 3 A. & E. 467, where, however, there was a fair ground for contending that the office was public. In *Rex v. The Master and Fellows of St. Catherine's Hall*, 4 T. R. 233, this court held that St. Catherine's Hall, in the University of Cambridge, was a private eleemosynary lay foundation, and refused a mandamus to compel the master and fellows to declare a vacancy of a fellowship, on the ground that the crown was visitor, and the jurisdiction was to be exercised by the great seal: and Lord MANSFIELD's opinion in *Rex v. Gregory*, 4 T. R. 240, note (a), (b) was treated \*as an obiter dictum. *Rex v. Shepherd*, 4 T. R. 381, where an information was refused for the office of a churchwarden, is an authority against the rule. In *Rex v. Bumstead*, 2 B. & Ad. 699, the information was granted: but that was the case of a city company exercising municipal powers. Even if the information lie, this is not a case where the court, in its discretion, would exercise the

(a) January 11th and May 23d; before Patteson, Coleridge, and Wightman, J. Lord Denman, C. J., took no part in the decision, having advised in the case when at the bar. The principal question argued was, whether the appointment, (made in July, 1842,) was valid, having been made by two only of three persons entitled to appoint, and one of the two having at the time been a Roman Catholic.

(b) See *Ex parte Wrangham*, 2 Ves. jun., 609, 617, 619; *The Attorney-General v. The Earl of Clarendon*, 17 Ves. 491, 498, 9.



power. (As to this, *Rex v. Dawes*, 4 Burr. 2022; *Rex v. Wardrop*, 4 Burr. 2024; *Winchelsea Causes*, 4 Burr. 1962; *Rex v. Parry*, 6 A. & E. 810; *Rex v. Sargent*, 5 T. R. 466, were referred to.)

Sir F. Thesiger, Solicitor-General, *Whitehurst* and *Gale*, contra. This is a case in which, if a quo warranto lies, it ought to be granted. [PATTESON, J. The main question is, whether the information can be issued in such a case. We should hardly decide the other points at this stage.] The writ ought to be granted, to raise the question whether it lies or not, which the prosecutor cannot otherwise try. In *Rex v. Marsden*, 3 Burr. 1812, the court expressly forebore to decide whether or not they could grant a quo warranto, at the instance of a private relator, for holding a market; and they gave judgment on the ground that the defendants were charged, not with holding a market, but with encouraging its being held. The passage in 2 Selw. N. P. 1145, 10th ed.(a) tit. *Quo Warranto*, referred to on the other side, is corrected in Tancred On Quo Warranto, p. 14, as follows, with respect to the statement that \*953] “before the statute of “Queen Anne,” (9 Ann. c. 20,) “a private person could not interpose in quo warranto.” “This statement is made by the learned writer, upon the authority of Lord MANSFIELD, from a manuscript report of the *Rex v. Trelawney*.(b) In the printed report in Burrow, the same view seems to have been taken by Mr. Justice WILMOT. The *Rex v. Trelawney*.(b) came before the court in Hil. 5, G. 3, and consequently preceded the discussion on this subject in *Rex v. Marsden*, 3 Burr. 1812, and *Rex v. Breton*, and another, 4 Burr. 2260; by which it is probable that Lord MANSFIELD’s opinion was changed. For, in East. term, 12 G. 3, the *Rex v. Gregory*, 4 T. R. 240, note a, appears to have been decided, in which Lord MANSFIELD expressly asserts, that informations were exhibited by the coroner before the 9th Anne. The records of the crown office leave no room to doubt, that informations were filed by the coroner anterior to that statute, even in cases directly within its provisions,(c) which clearly shows, that this latter statute did not first introduce these informations, but only made some regulations with respect to the prosecution of them.”(d) The discussions as to a relator’s costs on quo warranto, in such cases as *Rex v. Wallis*, 5 T. R. 375, and *Rex v. McKay*, 5 B. & C. 640, would have been superfluous if it had been clearly established law that quo warranto does not lie at all, at the instance of a private relator, in a case not within stat. 9 Ann. c. 20. Private relators have been held to be excluded, in cases \*954] alleged to fall “under that act, because the word “places,” in the recital of sect. 1, applied only to places ejusdem generis with

(a) The author, in this edition, p. 1146, note (g,) (and in p. 1158, note (g,) of the 11th edition,) refers to the passage of Mr. Tancred’s work, here cited.

(b) *Rex v. Trelawney*, 2 Selw. N. P. 1146, (10th ed.;) S. C. 3 Burr. 1615.

(c) “Such as mayor, bailiff, capital burgeses: the records are of the 5th of Anne, 2 Kyd on Cor. 416, ‘Ex informatione Mr. Dealtry.’”

(d) “2 Kyd. ib.”



those previously specified: and, again, rules for a quo warranto information at the instance of a private relator have been discharged, in cases of a nature as little public as this, because no such corporation existed as that described; *Rex v. Duke of Bedford*, 1 Barnard. K. B. 242; (a) *Rex v. Ogden*, 10 B. & C. 230, 233: or on the merits of the application, as in *Rex v. Attwood*, 4 B. & Ad. 481: but without resting the decision on the general incompetency of such relators. In *Rex v. Ramsden*, 3 A. & E. 456, (b) this court refused to grant a quo warranto information for exercising the office of governors and directors of the poor of St. Andrew, Holborn; in *Rex v. Hanley*, 3 A. & E. 463, note (b), they doubted whether such information lay in the case of trustees under a local act for certain parochial purposes; and in *Rex v. Beedle*, 3 A. & E. 467, they granted a rule nisi for a quo warranto information for exercising the office of commissioner under a paving and lighting act. In none of these cases was any franchise of the crown infringed; and this, probably, was the ground of decision in *Rex v. Ramsden*, the only one of them in which the court gave a judgment adverse to the present application. So in *Rex v. Daubney*, 1 Bott. P. L. 347, pl. 358, 6th ed., where a quo warranto information was moved for against a churchwarden, the court refused it, "a churchwarden not being such a public officer against whom an information would lie; for it was no usurpation upon the crown." Here the defendant is wrongfully exercising an office established under royal charter, and is, therefore, usurping upon the crown. [\*955] In *Rex v. Gregory*, 4 T. R. 240, note (a), where the application related to a fellowship in Trinity Hall, Cambridge, Lord MANSFIELD clearly was of opinion that the court might have granted an information if the case had required it. *Ex parte Wrangham*, 2 Ves. jun. 609, does not conflict with that decision: the Lord Chancellor there held only that, under the circumstances of that case, the visitatorial power which devolved upon the crown might fitly, in point of expediency, be exercised by the Court of Chancery. In *Rex v. The Master and Fellows of St. Catherine's Hall*, 4 T. R. 233, the Court of King's Bench refused to interfere, only because a visitatorial power had devolved upon the crown, which this court did not think it proper to exercise. [PATTESON, J. Have you been able to find any instance of a quo warranto for the purpose of trying the right to be master of an hospital?] In *Rex v. Attwood*, 4 B. & Ad. 481, 483, this court was of opinion that it might issue to try the right to be master or warden of a company in the city of London. In *Rex v. The Duke of Bedford*, 1 Barnard, K. B. 242, 273, 280, the conservators of the Level were only private undertakers; yet it seems that that was not deemed an objection to the quo warranto issuing. And in many cases, where powers of the same nature are exercised, there would be no redress against usurpation if the court would not interfere in this way. The power to grant

(a) See *Same v. Same*, 1 Barnard. K. B. 273, 280.

(b) See *In the Matter of the Aston Union*, 6 A. & E. 784.

quo warranto information according to the sound discretion of the court in cases \*other than those provided for by the statute of Anne is  
 \*956] impliedly recognised in *Rex v. Howell*, Ca. K. B. Temp. Hard. 247, and directly in *Rex v. Highmore*, 5 B. & Ald. 771. There may be no instance of such an information granted in a case strictly private; but it cannot be shown that the court has ever refused so to interfere where a franchise derived from the crown has been usurped upon. Nor is it to be assumed that the office in this case is strictly private: it has annexed to it one public function at least, that of preaching at stated times in the parish church. If any authorities appear to raise a doubt as to the remedy by quo warranto information in the case of a fair, market or leet, they may be reconciled with the proposition now contended for by observing that, if the existence of the franchise be altogether denied, the question may be tried by an action, and quo warranto may not be the proper remedy: but it is otherwise where the franchise clearly exists, and the question is only whether or not it has been usurped. [PATTESON, J. What franchise do you say proceeds from the crown in this case? Is any thing established here which the founder might not have settled by his will, without the aid of the crown?] The charter makes more comprehensive provisions than the will, and extends to property not comprised in it, and creates a corporation, which the will could not have done. The language of the court in *Rex v. Ogden*, 10 B. & C. 230, as to the cases in which quo warranto informations may be granted, is explained by *Rex v. White*, 5 A. & E. 613, and by 2 Roll. Rep. 115,(a) cited in Com. Dig. *Quo Warranto* (C 3), where it is said that, "if an information be for  
 \*957] using a \*franchise by a corporation, it ought to be against the corporation." "If for usurping to be a corporation, it ought to be against the particular persons." *Cur. adv. vult.*

PATTESON, J., in this term, (May 4th,) delivered the judgment of the court.

This case, which was argued, in the absence of my lord, before my brothers COLERIDGE, WIGHTMAN, and myself, stood over in consequence of the pendency before the House of Lords of the case of *Regina v. Darley*,(b) in which it was thought probable that some principles of law applicable to the present case might be laid down.

That case has not yet been decided: but it cannot affect the present, inasmuch as the only point contended for in it is, that an office of a public nature created by act of parliament may be the subject of proceedings by writ of quo warranto, though strictly speaking there be no usurpation upon the crown. The law therefore remains precisely as it was before, as to offices of a private nature.

Here the office is that of master of an hospital founded by a private individual by will, having no public duties or jurisdiction of any kind;

(a) *Le Roy v. Cusacke*, 2 Roll. Rep. 113, 115.

(b) *Darley v. The Queen*, 12 Clark & Fin. 520. Judgment delivered, May 19th, 1846.

which was so clear that the learned counsel in arguing were obliged to contend that a provision in the will, that the master should preach a certain number of sermons in the parish church, created a public duty, it being obvious that the founder could not confer the right of so preaching without the consent of the ecclesiastical authorities, and that the public had \*nothing to do with it, or any right to enforce the performance.<sup>(a)</sup> [\*958]

It is true that a charter was obtained from the crown according to the will of the founder, in order to incorporate the members of his foundation. But that alone is quite immaterial, as the crown neither added any thing to the foundation, nor reserved to itself any control over it.

An act of parliament was passed in modern times to extend this foundation, and to make some alterations which by circumstances had become desirable: but it did not create a new corporation; nor did it confer any jurisdiction of a public nature, or enjoin any duty of the sort.

We are therefore clearly of opinion that the writ of quo warranto is not applicable to a case of this sort, and that the rule for granting it must be discharged. Rule discharged.

(a) The duty, as appears by the recital of stat. 5 G. 4, c. 38, (private,) was enjoined by an ordinance annexed to the charter: see p. 948, *antè*. Whether or not the charter in this respect followed the will, did not appear from the affidavits, in which the will was not fully set out.

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**The QUEEN against The Inhabitants of NORBURY. *Thursday, May 7th***

Reported, 6 Q. B. 534, note (a).

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**\*The QUEEN against HARRIET ELEANOR PELHAM. [\*959]**

An indictment charged that *while* a person of unsound intellect was under the care of defendant, defendant treated such person improperly and neglectfully in certain stated particulars.

*Held*, not to be a substantive charge; and judgment was arrested.

Another count charged that the same person was the illegitimate child of defendant, a female, who had means for the comfortable support and maintenance of both, whereupon it became her duty to take proper care of him; but that she did not take proper care of him, but kept and confined him in a dark, cold, and unwholesome room, neglected to provide him with proper clothing, permitted him to become dirty, allowed the room to become foul so as to cause unwholesome smells, and kept him without proper air, warmth, and exercise necessary for his health, to his damage and peril.

Judgment arrested: first, because no duty was shown; secondly, because it was not shown that the conduct of the defendant had or must have occasioned actual injury.

**INDICTMENT**, containing four counts for ill treatment of a person named Brent Spencer.

The second count charged that defendant, “unlawfully and maliciously contriving and intending to hurt and injure the said Brent Spencer, being a person of unsound intellect and incapable of taking care of himself,

did, whilst the said Brent Spencer, being such person as last aforesaid, was under the care, custody and control of the said H. E. Pelham, and whilst she, the said H. E. Pelham, received divers sums of money for his support and maintenance, with force and arms, &c., to wit, on," &c. "and for a long space of time, to wit, for the space of ten years, before then, and at," &c. "aforesaid, cruelly, inhumanly, unnecessarily, maliciously, and unlawfully, keep, confine, and imprison, the said B. S. in the dark, cold and unwholesome room aforesaid,(a) and did, during the time last aforesaid, cruelly, inhumanly, unnecessarily, maliciously, and unlawfully, neglect and omit to clothe the body of the said B. S., and did then and there suffer and permit the body of the said B. S. to be naked and foul, miry, and covered with soil, excrement and vermin, and \*960] did also then and there suffer and permit divers large quantities of filth, soil, excrement, and vermin, to collect and remain in the said room, and there to cause divers noisome, noxious, offensive, and unwholesome smells, vapours, and stench, and did also then and there keep the said B. S. without sufficient and proper air, warmth and exercise necessary for the health of the said B. S., to the great damage and peril of the said B. S., to the evil example, &c., "and against the peace," &c.

Third count. "That the said B. S. was the illegitimate son of the said H. E. P., and that for a long space of time, to wit, for the space of ten years, the said B. S. was of unsound intellect, and incapable of taking care of himself; and during all that time the said B. S. resided with the said H. E. P., and the said H. E. P. had possessed and enjoyed ample and sufficient means for the comfortable support and maintenance of herself and the said B. S.; whereupon it became and then was the duty of the said H. E. P., during all the time aforesaid, to take due and proper care of the said B. S.: nevertheless the jurors," &c. "present that the said H. E. P., being an evil disposed person, did not nor would, during the time aforesaid, take due and proper care of the said B. S., but on the contrary thereof, during that time, to wit, in the parish," &c., "cruelly, inhumanly, unnecessarily, maliciously, and unlawfully, did keep and confine the said B. S. in a dark, cold, and unwholesome room, in and parcel of a dwelling-house situate," &c., "and did also then and there neglect and omit to provide and furnish the said B. S. with proper and requisite clothing for the body of him the said B. S.; and did then and there suffer and permit the body of the said B. S. to be, and the same was during the \*961] time aforesaid, foul, miry," &c. (as in the \*1st count,) "and did also then and there suffer and permit divers large quantities of filth," &c., "to collect," &c., "in the said room, and there to cause," &c. (as in the 1st count,) "and did also then and there keep the said B. S. without sufficient and proper air," &c., (as in the 1st count,) "to the

(a) The second and third counts contained references to allegations, which it is not material to set forth, in the first count.

great damage and peril of the said B. S., to the evil example," &c., "and against the peace," &c.

Plea. Not guilty.

On the trial, before WILLIAMS, J., at the sittings in Middlesex, after Hilary term, 1845, a verdict was found for the defendant on the first and fourth counts, and for the crown on the second and third. In Easter term, 1845, *Edwin James* obtained a rule nisi for arresting the judgment. In this term<sup>(a)</sup>

*Watson* showed cause. It is objected that neither the second nor the third count shows an indictable offence. Crime may consist in malfeasance, misfeasance, or even nonfeasance. The second count charges a criminal neglect in the case of a person placed under the care of the defendant, that person being incapable of taking care of himself. Had death ensued, in such a case, the offence might have been manslaughter, or even murder. But, further, the count shows an imprisonment of the lunatic by the defendant; and the act of imprisonment casts upon the defendant the duty of providing for the food and clothing of the person confined. [PATTESON, J. There is no direct averment that the lunatic was under the care of the defendant, or that the defendant was paid for \*his support: nothing appears but that, *while* he was under her [\*962 care, and *while* she received the moneys, she did so and so.] That is a sufficiently direct allegation: authorities to this effect are collected in note (9) to *Posterne v. Hanson*, 2 Wms. Saund. 61 m, and note (4) to *Cutler v. Southern*, 1 Wms. Saunds. 117 b. In *Rex v. Smith*, 2 C. & P. 499, it was held, by BURROUGH, J., that a man is not liable to an indictment for neglecting to maintain an idiot brother, who is an inmate in his house, but not proved to be under his care; and that is not an assault or imprisonment to keep the idiot, if bedridden, in a dark room without sufficient warmth or clothing. But here it is charged that the defendant had the care of the lunatic, and received money for his support. In such a case, the neglect is indictable, because there is a duty; *Rex v. Friend*, Russ. & Ry. 20; *Regina v. Smith*, 8 C. & P. 153; *Regina v. Marriott*, 8 C. & P. 425. In the case last-mentioned, indeed, PATTESON, J., expressed a doubt (which seems warranted by the opinion of CHAMBRE, J., in *Rex v. Friend*,) whether, during the life of the party, the defendant could be indicted for a mere breach of contract. [PATTESON, J. That doubt crossed my mind; but I did not mean to decide such a point: I was speaking only of the particular facts of the case before me, where death had occurred: certainly I did not mean to lay down that there could be no indictment at all if there was no death.] In *Urmston v. Newcomen*, 4 A. & E. 899, 905, in answer to a remark by counsel, that "by the common law, if a child perish for want of proper care, it is murder in the person neglecting it," Lord DENMAN, C. J., said: "If the

(a) The case was argued on April 15th and 16th, before Lord Denman, C. J., Patteson, Williams, and Wightman, Js.

\*963] person has the actual custody ;” and PATTESON, J., added : \* “ Or the child be part of his family.” The third count alleges that the defendant was the parent of the lunatic, and had means for providing properly for him, but neglected to do so. That is an offence on common law principles.

*E. James and Phinn*, contra. If the second count charge an unlawful imprisonment, it is double ; and, in *Rex v. Clendon*, 2 Str. 870, S. C. 2 Ld. Raym. 1572, judgment was arrested because the indictment charged two distinct offences, the beating of two persons. [Lord DENMAN, C. J. That case is not law now.] It was so said in *Rex v. Benfield*, 2 Burr. 980, 984 ; but the case is not necessarily overruled except so far as it decided that assaulting two persons is necessarily two acts ; and, no doubt, one act may comprise an assault upon two. So in *Rex v. Benfield*, only one act was charged, singing a slanderous song. Here, if there be a charge of imprisonment, it is a charge distinct from that of nonfeasance.(a) But, in fact, no unlawful imprisonment is charged. The earliest definition of imprisonment is that given in Assis. 22 Ed. 3, fol. 104 B, pl. 85, where THORPE (C. J. of K. B.) said : “ Que imprisonment est dit en chaqun case ou home est arrest per force et encontre sa volunt, tout soit en la haut strete ou aillours, tout ne soit il my emprison en meason,” &c. This definition is inapplicable to the case of a lunatic placed under the charge of another person ; there is, properly speaking, no con-  
 \*964] tradiction of his will, \*and no force ; and the indictment does not charge either. But, if the custody be not wrongful, no other matter of criminal charge appears ; for no duty arises from the custody, nor is any breach of duty, or any duty, alleged. No actual injury is said to have accrued : there are only the general words “ damage ” and “ peril.” It is not shown that the defendant was bound to keep the lunatic’s person clean, or to clothe him, or to keep the room in proper order. But, further, it is not substantively alleged that the lunatic ever was under the care of the defendant ; nor is either the imprisonment or the neglect substantively alleged ; both are only said to have taken place while the lunatic was in the care of the defendant ; so that the supposed offences are charged as having been committed at a time that may never have been. The authorities in the notes to Saunders, referred to on the other side, are inapplicable. Allegations may indeed be treated as substantively made, though introduced only by “ because ” or “ although,” or expressed by a participle, as “ proferendo,” “ dans plagam mortalem,” and the like : *Henly v. Walsh*, 2 Salk. 686. [PATTESON, J. “ Being ” is often taken as a direct allegation.] That is so ; *Smith v. Adkins*, 8 M. & W. 362 ; *Rex v. Somerton*, 7 B. & C. 463.(b) But here the allegation appears only as descriptive of the time at which something else occurred.

(a) Reference was also made, in the present argument, to *Regina v. Campbell*, then standing for argument in the Exchequer Chamber, upon error on a judgment pronounced in this court, February 14th, 1846 ; since affirmed, December 3d, 1847.

(b) See *Faulkner v. Chevell*, 5 A. & E. 213, 218.



As to the third count, the duty charged does not arise from the fact of the lunatic being the illegitimate son of the defendant; *Regina v. Maude*, 2 Dowl. N. S. 58. And, as in the second count, no actual injury is shown. No contract appears in either count. *Cur. adv. vult.*

\*Lord DENMAN, C. J., in this term (May 4th) delivered the judgment of the court. [\*965]

Of the two counts upon which the defendant was convicted, one was objected to for want of a positive averment that the defendant ever committed the acts for which she stood indicted.

They were all said to have been done *whilst* the unfortunate lunatic was under her care or control; but there was no averment that he ever was so. Some cases were quoted to show that this followed by necessary implication from the averment that the acts were done whilst under her control; but none came up to the point.

With respect to the other count, there was no averment that the lunatic was under the control of the defendant, nor any alleged duty in her to take care of him shown. Again, even if such duty had been shown, acts of commission and omission were charged, very likely to produce injury, but it was not alleged that injury was actually produced; and it is by no means a necessary consequence of such acts; nor was it alleged to have been the actual consequence of them, nor even to have continued so long that injury must, or probably would, result. There is, therefore, nothing at most beyond a probable conjecture, that the patient's suffering was at all connected with his mother's misconduct.

The judgment must be arrested.

Judgment arrested.

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\*RICHARD GILLETT against THOMAS HENRY WHITMARSH, CHARLOTTE SELFE and HARRIETT SELFE. [\*966]

To an action on a promissory note for 150*l.*, by payee against maker, defendant pleaded that W. was indebted to plaintiff in 3612*l.* 10*s.*, and was unable to pay in full; whereupon it was agreed between plaintiff, defendant and W., that plaintiff should accept a composition, to wit, 1500*l.*, in satisfaction and discharge of the 3612*l.* 10*s.*, and, in consideration of the premises, and that plaintiff would accept the 1500*l.* in satisfaction and discharge, defendant should make the note in part payment, and on account, of the 1500*l.*, and that plaintiff should not enforce, or attempt to enforce, or in any way claim or demand, payment of any further sum than the 1500*l.*; that defendant made the note upon the terms of the agreement, and that there never was any other consideration; that W. afterwards, and before the note was due, became bankrupt; yet plaintiff, without defendant's consent, proved in the bankruptcy for the full amount of the 3612*l.* 10*s.*

*Held* a good plea, on motion for judgment non obstante veredicto; but, *Held*, on motion for a new trial, that the plea was not proved by evidence of an agreement that, on giving 350*l.* down, 150*l.* by note, and a bond of other parties for 1000*l.*, W. should be released from the original debt.

**ASSUMPSIT.** The first count of the declaration alleged that defendants, together with one Thomas Whitmarsh, who had since become bankrupt

and obtained his certificate, on 26th September, 1847, made their promissory note, and thereby jointly and severally promised to pay to plaintiff or order 150*l.* with interest, twelve months after date, which period had elapsed. The second count was on an account stated.

Charlotte and Harriett Selfe suffered judgment by default.

First plea, by defendant T. H. Whitmarsh, to the first count, that, before and at the time of the making of the promissory note, one Thomas Whitmarsh was indebted to plaintiff in a large sum of money, to wit, 3612*l.* 10*s.*, and that the said T. W. was then in pecuniary difficulties and embarrassed circumstances, and unable to pay plaintiff the said sum of 3612*l.* 10*s.* in full: whereupon it was then proposed and agreed, by and between plaintiff and defendant and T. W., that plaintiff should  
 \*967] take and accept a composition or \*part of his debt of 3612*l.* 10*s.*, to wit, the sum of 1500*l.*, in satisfaction and discharge of the said sum of 3612*l.* 10*s.*, so due and owing from T. W. to plaintiff as aforesaid; and, in consideration of the premises, and that plaintiff would accept the said sum of 1500*l.* in satisfaction and discharge as aforesaid, defendant T. H. W. should make the promissory note in the first count mentioned, and deliver the same to plaintiff in part payment and discharge, and for and on account, of the said sum of 1500*l.*; and that plaintiff should not enforce, or attempt to enforce, or in any way claim or demand, payment of the whole of the said sum of 3612*l.* 10*s.*, or any further or other sum than the said sum of 1500*l.* That defendant T. H. W. made the promissory note upon the terms and conditions of the said agreement, and that there never was any other consideration for him, the said defendant T. H. W., making the said note, or paying any part of the amount thereof. That, although T. W., afterwards and before the said note became due, and before the commencement of this suit, to wit, 20th January, 1843, became and was declared a bankrupt, according to the true intent and meaning of the laws in force concerning bankrupts, yet plaintiff, in violation of good faith and of the terms of the said agreement, then wrongfully and injuriously, and without defendant T. H. W.'s consent, went and appeared in the court of bankruptcy, and then proved, in the matter of the said bankruptcy of the said T. W., for the full amount of the said sum of 3612*l.* 10*s.*; wherefore T. H. W. neglected and refused to pay the note; and the note then became and was and is of no force and utterly void: and this, &c.: verification. Replication: De injuriâ.

\*968] \*Second plea, to the last count, Non assumpsit. Issue thereon.

On the trial before Lord DENMAN, C. J., at the London sittings after Michaelmas Term, 1843, no evidence being offered in support of the second count, the defendant began, and offered the proof stated hereafter in the judgment of the court. Verdict for the defendant on the issue on the first plea, and for the plaintiff on the other issue.

In Hilary term, 1844, *Thesiger* obtained a rule nisi for judgment for the plaintiff, non obstante veredicto, or for a new trial on the ground that the evidence did not prove the plea. In Michaelmas term, 1845,<sup>(a)</sup>

Sir *F. Kelly*, Solicitor-General, and *Lush*, showed cause. The plea raises a good defence. It is true that, where it is agreed between debtor and creditor only that the creditor shall receive, in satisfaction of his debt, a sum smaller than the debt, the acceptance of such sum is not a satisfaction in law. But here another party intervenes, and joins in a promissory note. It is true that the other party is liable on the note severally as well as jointly with the original debtor; but the creditor obtains, under the agreement, the liability of both. The agreement has been broken by the plaintiff, who, by proving for the whole debt, has diminished the fund to which the defendant, as surety, looked for his own indemnification. It is as if the plaintiff had prejudiced the defendant's claim upon the original debtor in any other way, as by giving time, or making a composition without the defendant's consent. It may be urged that, "by stat. 6 G. 4, c. 16, s. 52, [<sup>\*969</sup> the defendant may stand in the plaintiff's place, after the plaintiff's proof of the debt. But that section is inapplicable: the defendant is not surety for the debt which the plaintiff has proved, but for the sum named in the promissory note. If it is objected that the agreement is not shown to be in writing, the answer is that the defence is raised by showing the consideration for the note, which may be done by oral evidence. [Lord DENMAN, C. J., referred to *Moseley v. Hanford*, 10 B. & C. 729.] The attempt there was to vary the terms of the note by oral evidence: here the plea merely describes the consideration of the note and shows that it has failed. A similar defence was held good in *Wells v. Hopkins*, 5 M. & W. 7.

(They then argued on the facts.)(<sup>(b)</sup>)

Sir *F. Thesiger*, Attorney-General, and *Hoggins*, contra. The plea sets up a contemporaneous contract, not shown to be in writing, to vary the effect of the note. That cannot be done; *Adams v. Wordley*, 1 M. & W. 374, S. C. Tyrwh. & Gr. 620. [Lord DENMAN, C. J. I think you cannot, at this step, object to the want of averment of a written contract. If a written agreement be necessary, and none was proved, the objection should have been taken at the trial, and then the issue would have been found for the plaintiff. We must now assume that a written agreement, if necessary, was proved.] It is true that a defendant may prove either that there was no consideration for a note on which he is sued, or that it has failed; *Abbott v. Hendricks*, 1 M. & G. 791. But here it is sought to "incorporate a distinct condition with the terms of the note. [<sup>\*970</sup> Further, the alleged agreement is not shown to have been broken. It is not averred that the plaintiff has received any dividend: mere proof

(a) November 10th. Before Lord Denman, C. J., Williams and Coleridge, Js.

(b) As to this part of the case, it is considered sufficient to refer to the judgment.

of a debt cannot be a breach. In truth, the proof is for the benefit of the surety, who would have had a right to complain of the creditor if he had neglected to make it.

(They then argued on the facts.)

*Cur. adv. vult.*

Lord DENMAN, C. J., in this term, (May 4th,) delivered the judgment of the court.

The declaration stated that the defendants (together with one Thomas Whitmarsh, who had become bankrupt) made a promissory note, on the 26th September, 1842, for payment to the plaintiff or order, twelve months after date, of 150*l.*, with interest from the date of the note.

To this the defendant Whitmarsh pleaded that one Thomas Whitmarsh was indebted to the plaintiff in 3612*l.* 10*s.*; and that it was agreed between the plaintiff and the defendant, and Thomas Whitmarsh, that the plaintiff should accept 1500*l.* in satisfaction, and that, in consideration of the premises, and that plaintiff would accept 1500*l.* in satisfaction, the defendant would make the promissory note mentioned in the declaration, and deliver it to the plaintiff in part payment of the said sum of 1500*l.*, and that the plaintiff should not enforce, or in any way claim or demand, payment of the original debt of 3612*l.* 10*s.*: and that the defendant made the note upon those terms and for no other consideration: that Thomas Whitmarsh, after the note was made, and before it became due, became  
 \*971] a bankrupt; \*and plaintiff, in violation of the agreement, proved under the commission for the original debt of 3612*l.* 10*s.*; and that the note thereupon became void.

The plaintiff replied *De injuriâ*.

Upon the trial, the jury found a verdict for the defendant: but a motion was made for a new trial, upon the ground that the evidence did not support the plea as to the terms upon which the note was stated to have been given. And we are of opinion that it did not, and that the rule should be absolute for a new trial.

The agreement stated in the plea is, that the plaintiff would accept 1500*l.* in satisfaction; that the defendant should make the promissory note in part payment of the 1500*l.*, and that the plaintiff should not enforce or attempt to enforce, or in any way claim or demand, payment of the original debt of 3612*l.* 10*s.* The evidence, however, was that, on giving 350*l.* down, 150*l.* by note, and a bond of the Misses Selfe and another for 1000*l.*, Thomas Whitmarsh should be released from the original debt; and a deed between the parties, executed in November, after the note was given, was confirmatory of the evidence of the witness to the original agreement that such were the terms of the arrangements made at the time.

There was, as it seems to us, a most material variance between the agreement stated in the plea and that proved.

The agreement in the plea is that the plaintiff would accept 1500*l.* in satisfaction, that the defendant should make his note in part payment, and

that the plaintiff would not enforce or attempt to enforce payment of his original debt.

But the agreement proved was, that, *upon* payment of \*350*l.* down, and 150*l.* by promissory note, and 1000*l.* by bond, Thomas Whitmarsh should be released from the original debt, making the obligation upon the plaintiff to release the bankrupt or to refrain from prosecuting his claim a condition subsequent to his receiving 350*l.* down and a bond for 1000*l.*, as well as the promissory note: which most materially varies from the agreement as stated in the plea. [\*972]

The rule was for a new trial, or judgment for the plaintiff non obstante veredicto. But, though we think the plea was not supported by the evidence, we do not think that after the verdict it is bad upon the face of it, or that, supposing the agreement and other facts stated in it to have been proved, it does not afford a defence to the action, as showing a total failure of the consideration upon which the note was given.

We therefore think the rule should be made absolute for a new trial.

Rule absolute for a new trial.

\*DOE on the demise of ELIZABETH DARKE against [\*973  
SAMUEL BOWDITCH.

A lease contained the following clause: "And also shall be lawful for E. D., (the lessor,) "her executors," &c., "to call on tenant for quarterly payment of rent, or, if otherwise, as now accepted, at Michaelmas and Lady-Day, as a matter of favour, with a quarter remaining in hand, and if not paid in twenty days after, rent as stated, and 10*l.* of increased rent for breaking up land by acre, then the tenant shall be liable to have the rent, &c., due recovered by sale and distress, or to enter on the premises for the same till it be fully satisfied."

*Held*, 1. That the clause might be understood as reserving a right of entry, upon non-payment of rent, to hold the premises till the arrears were paid.

2. That, under this clause, the lessor could not enter without the common-law formalities, sect. 2 of stat. 4 G. 2, c. 28, applying only where there is a right of re-entry by which the lease is avoided.

**EJECTMENT for messuages and land in Devonshire.**

On the trial, before ROLFE, B., at the last Devonshire assizes, it appeared that the defendant held the premises under a lease from the lessor of the plaintiff, by deed, executed by both parties, dated 27th November, 1841, for a term of seven years, commencing at Lady-Day, 1842, (with an exception not material here,) at the yearly rent of 105*l.* The lease contained the following clause, which was the only one showing at what times, or how often in the year, the rent was payable.

"And also shall be lawful for Elizabeth Darke, her executors, administrators, and assigns, to call on tenant for quarterly payment of rent, or, if otherwise, as now accepted, at Michaelmas and Lady-Day, as a matter of favour, with a quarter remaining in hand, and, if not paid in twenty days after, rent as stated, and 10*l.* of increased rent for breaking up land by acre, then the tenant shall be liable to have the rent, &c., due reco-

vered by sale and distress, or to enter on the premises for the same till it be fully satisfied."

\*974] On the day of the demise, more than half a year's \*rent was in arrear, and there was no distress on the premises. The counsel for the defendant contended that the clause was unintelligible; but that, construing it as giving a power of entry to hold till the rent was satisfied, sect. 2 of stat. 4 G. 2, c. 28, was inapplicable, and therefore, as no evidence was offered that the formalities necessary for a re-entry at common law had been fulfilled, the plaintiff could not recover. A verdict was taken for the plaintiff, with leave to move for a nonsuit. In this term, *J. Greenwood* obtained a rule nisi accordingly: and, on a subsequent day of the term, (a)

*Crowder* and *Merivale* showed cause. The clause is not technically drawn: but the meaning clearly is that the landlord may re-enter on a quarter's rent being in arrear twenty days after demand. A strictness has sometimes been applied in the construction of clauses which destroy an estate; but that rule will not be extended to clauses regulating the relation of landlord and tenant. In *Doe dem. Davis v. Elsam*, Moo. & M. 189, Lord TENTERDEN ruled that in such cases "the provisoes ought to be construed according to fair and obvious construction, without favour to either side." In *Doe dem. Wyndham v. Carew*, 2 Q. B. 317, (b) this court refused to attempt to find out a meaning for a clause of re-entry; but the proviso there was much more obscure than the clause now in question. The intent of the parties will be looked to, according to the prin-

\*975] ciples laid down by \*Lord MANSFIELD in *Goodtitle, lessee of Clarges, v. Funucan*, 2 Doug. 565. (c) Then assuming that the court will collect from the proviso the meaning suggested, there was here six months' rent in arrear; and therefore ejectment lies, under stat. 4 G. 2, c. 28, s. 2, without a demand; *Doe dem. Scholefield v. Alexander*, 2 M. & S. 525. (d) It will be contended, on the other side, that the statute is inapplicable, because the right reserved is only of entry quousque, till the rent be satisfied. But that is enough to support an action of ejectment; *Jemott v. Cowley*, 1 Saund. 112 c, confirmed in *Doe dem. Biass v. Horsley*, 1 A. & E. 766. [PATTESON, J. In *Jemott v. Cowley* the entry was at common law.] The statute applies wherever the landlord "hath right by law to re-enter for the non-payment." That places the landlord in the same position as he would be in, at common law, if he had made a proper demand; *Hassell dem. Hodgson v. Gouthwaite*, Willes, 500, note (b) to p. 507. The condition is of the class, mentioned in Sheppard's Touchstone, p. 118, "where a lease is made rendering rent on a day, on condition if it be not paid that the lessor shall enter on the land and keep it till the rent be paid." [PATTESON, J. It will be said that this is not a re-entry,

(a) April 23d. Before Lord Denman, C. J., Patteson, Williams, and Wightman, Js.

(b) See *Regina v. The Midland Railway Company*, ante, p. 587.

(c) See note (c) to *Hassell dem. Hodgson v. Gouthwaite*, Willes, 507, Durnford's edition.

(d) See *Doe dem. Earl of Shrewsbury v. Wilson*, 5 B. & Ald. 363, 384.



but an entry ; it does not put the landlord in as of his former estate.] The words are used indiscriminately. In Littleton, sect. 327, the word applied to such a condition is “enter;” but Lord COKE, in his comment on this section, 203 a, says: “the feoffor by his re-entry gaineth no estate of freehold, but an interest \*by the agreement of the parties to take the profits in nature of a distress.”(a) A difficulty may [\*976] be suggested from the clause, towards the end of sect. 2, which provides that, if no bill be filed in six months, the lessee shall be foreclosed and the lessor shall hold the premises discharged of the lease. But that clause does not override the preceding part of the section ; the framer of the act was directing his attention to the preventing vexatious proceedings in equity. That is the explanation given in note (16) to *Duppa v. Mayo*, 1 Wms. Saund. 287 c, 6th ed. In strictness, however, the landlord here, upon entry, would hold discharged of the lease. [WILLIAMS, J. Suppose the lessee paid the rent after the entry.] The landlord would then not hold at all ; while he does hold, he is not subject to the lease ; none of the covenants could be enforced against him. If an action were brought by a third person for any thing relating to the land, he would defend in his own name and on his own title. On the motion for this rule, reference was made to note (a) in p. 667 of 2 Chitty’s Statutes, where it is said : “this section only applies when there is a clause of re-entry in a lease, and a forfeiture committed by non-payment of rent.” But the annotator refers to a subsequent note (k) in p. 673, relating to stat. 11 G. 2, c. 19, s. 16, where it is clear, from the language of the legislature, that rights of entry or forfeiture destroying the lease are spoken of. No such indication appears in stat. 4 G. 2, c. 28, s. 2.

*J. Greenwood*, contra. The proviso in the lease is unmeaning. The authority of the dictum in *Doe dem. Davis v. Elsam*, Moo. & M. 189, is destroyed by later cases ; *Doe dem. Palk v. Marchetti*, 1 B. & Ad. 715, 720 ; *Doe dem. Sir W. Abdy v. Stevens*, 3 B. & Ad. 299, 303. If any [\*977] meaning can be assigned to the proviso, it must be confined to failure of payment demanded quarterly. But, giving the clause the meaning contended for on the other side, the statute is inapplicable. No case has occurred in which it has been held to relate to any right of entry which does not put the lessor in of his old estate. [Lord DENMAN, C. J. I do not see how the plaintiff can get rid of the inference arising from the clause as to mortgagees, at the end of sect. 2.] It is impossible to escape from the inference that the party entering is to hold absolutely if the mortgagee does not interfere. But, in the present case, the lease is not at an end : the rent would run on while the landlord was in. [PATTESON, J. Would not the same difficulty have arisen if the landlord here had complied with the common-law formalities?] No : the difficulty is that the statute, by its words, applies only where the landlord could hold discharged of the lease. If the argument on the other side be correct, the

(a) See note [93] to p. 203 a, in Hargrave and Butler’s edition.

statute applies to any entry for non-payment of rent. Now suppose the right reserved were to enter for a fortnight: could the lessor, under the statute, hold discharged of the lease? Again, by sect. 4, in cases within the statute, payment after the trial of the ejectment is too late; *Roe dem. West v. Davis*, 7 East, 363; *Doe dem. Harris v. Masters*, 2 B. & C. 490: but here the landlord must give up possession whenever the arrears are

\*978] satisfied. It is \*not denied that the lessors of the plaintiff might have recovered by pursuing the common formalities.

*Cur. adv. vult.*

Lord DENMAN, C. J., in this term, (May 4th,) delivered the judgment of the court.

This was an action of ejectment by a landlord against his tenant, upon a condition in the lease for re-entry in case of non-payment of rent. The lessor of the plaintiff obtained the verdict at the trial; but several points were made by the defendant, to one only of which it is necessary to advert, as upon that we think he is entitled to succeed.

The lease was very inartificially drawn: but, giving it a reasonable construction, it contained a condition that, upon non-payment of the reserved rent, the lessor might enter and hold the premises until the arrears were paid. The precise words are "to enter on the premises for the same till it be fully satisfied."

Such a condition would have enabled the lessor to maintain ejectment at common law, fulfilling the requisite formalities; and he would have been entitled to hold the premises until the arrears were satisfied: but, when they were satisfied, the lessee might re-enter, and hold the premises under the lease as before. The effect of such a condition in a lease as that in question is stated in Co. Lit. 203 a.

In the present case, the lessor of the plaintiff might, as was conceded, have maintained ejectment at common law, making a formal demand and pursuing the other formalities required by the common law; but he has not done so. This ejectment is brought under the provisions of stat.

\*979] 4 G. 2, c. 28, s. 2; and the question is, \*whether the lessor of the plaintiff can avail himself of that statute if his right to re-enter is only to hold until the rent is satisfied, and not to avoid the lease.

The object of the second section of stat. 4 G. 2, c. 28, appears, by the preamble, to have been to remove the inconvenience to landlords from the niceties attending re-entries at common law, and from the obtaining injunctions in equity: and it provides that, where half a year's rent is due, and the landlord has a right to re-enter for non-payment, the service of a declaration in ejectment, in the manner pointed out by the statute, shall stand in the place of a demand and re-entry: and, if the tenant appears, and it is proved that half a year's rent was due and no sufficient distress upon the premises when the declaration was served, and that the landlord had power to re-enter, then the landlord shall recover judgment and execution in the same manner as if there had been a demand and re-entry.

If the statute had stopped there, the plaintiff in the present case might have been entitled to avail himself of it, assuming that half a year's rent was due, and that there was no sufficient distress upon the premises, as he had a right to re-enter upon non-payment of rent; and the only effect of the statute would have been to relieve the plaintiff from the common-law formalities of a demand and formal re-entry: and he would have recovered possession of the premises, to hold until the arrears of rent were satisfied, when the lessee would be entitled to re-enter under his lease.

The statute, however, goes on, in the same second section, to say that, "in case the lessee" "shall permit and suffer judgment to be had and recovered on such ejectment, and execution to be executed thereon, \*without paying the rent and arrears, together with full costs, and without filing any bill or bills for relief in equity, within six calendar months after such execution executed; then and in such case the said lessee" "shall be barred and foreclosed from all relief or remedy in law or equity, other than by writ of error, for reversal of such judgment, in case the same shall be erroneous, and the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease." [\*980]

This latter part of the second section applies to the whole: and, if the right to re-enter in the present case is within the meaning of the statute, the effect would be that, unless the tenant paid the arrear of rent within six months, the lease would be absolutely forfeited, though the condition is merely that the landlord shall enter and hold until the arrears are paid; and the statute would enlarge the terms of the condition, and create a forfeiture where none was intended by the parties.

We are of opinion that the statute was not intended so to operate, but that its application is to those cases only where the right to re-enter is absolute, and not, as in this case, *quousque*, and the lease upon such re-entry is forfeited. Before the statute passed, equity would relieve against a forfeiture for non-payment of rent: but, as it was uncertain whether the tenant would apply for relief, or when, much inconvenience was caused to landlords, which the statute was calculated to remove by limiting the period to six months.

Our judgment therefore is for the defendant.

Rule absolute.

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\*The QUEEN against CONYERS and Three Others.

[\*981]

By a regulation of the judges, made under stat. 6 & 7 Vict. c. 20, s. 16, it is ordered that every mandamus shall be tested and made returnable "on a day certain," before the queen, &c.

*Held*, that the words requiring the teste to be "on a day certain" mean a day in term.

*Held* also, Lord Denman, C. J. dubitante, that, where a mandamus had, under the direction of a special pleader, been drawn with a teste out of term, and so issued, and a return had been made and demurred to, whereupon the defendants objected that the writ was

wrongly tested, the court, by its general authority, might amend the teste on motion by the prosecutor. For,

That the mistake was that of the officer, not the party, the officer being bound to see that a proper teste was affixed, and not adopt an irregular one given by the prosecutor;

That the mistake arose from a misconstruction not unreasonable;

And that the court, knowing the date at which the rule for a mandamus was made absolute, might amend according to that date.

*Mandamus*, to the verderers of a royal forest, recited that the Chief Justice and Justice in Eyre had granted license to the prosecutor to hunt, &c. in the forest, provided the license were brought to the next court for the said forest, to be enrolled among the records there: and that the defendants had refused to enroll: the writ therefore commanded them to enroll the license at the next court of attachment. Return, that the forest was not within any manor, &c. of the prosecutor, nor was he seised, &c. of the said forest, for any estate whatever; and that the license purported to extend over lands within the forest, of which A., B., and C. were seised of estates of freehold, and were the occupiers.

*Held*, on demurrer to the return, that the license was void as to the last-mentioned lands, and therefore the court could not grant a mandamus to enroll it.

The defendants also returned, that the verderers had not been required by the Chief Justice and Justice Eyre, or by any court of the forest, to enroll the license.

*Held*, on demurrer to the return, that this also was an answer to the writ, for that the court of the Chief Justice in Eyre had power to compel obedience in the verderers, who were its officers, and therefore the Court of Queen's Bench ought not to interfere, unless in a case of urgent necessity. Judgment for defendants.

**MANDAMUS.** The material parts of the writ were as follows.

“Victoria,” &c. “To Henry John Conyers,” &c., (the defendants,) “Esquires, verderers of our forest of Waltham, in the county of Essex, greeting.

“Whereas we have been given to understand,” &c., “that our Right Honourable Thomas Grenville, Warden, Chief Justice and Justice in Eyre of all our forests, chases,” &c., “on the south side of Trent, did, on,” &c., (1st September, 1843,) “by writing under his hand and the seal of his office of Chief Justice and Justice in Eyre as aforesaid, bearing date,” &c., “directed to all and singular the officers and ministers of our forest of Waltham aforesaid, and reciting that Edward Jones Williams, of,” \*&c., Esquire, had made his request unto him for a license, \*982] to hunt, hawk, course, set, shoot and fish in our said forest of Waltham, and that he had confidence in him, the said E. J. W., that he was a preserver of the game and would use the license thereby given to him not for the destruction and spoil thereof, but for his recreation only, will and require all and singular the officers and ministers of our said forest, and all others whom it might concern, that they and every of them should permit and suffer the said E. J. W. at all seasonable times, with one person in his company, on, from and after the first day of September to the 12th day of February in every year, and at no other times, to hunt, hawk, course, set, shoot, and fish in the public waters of our said forest, and to kill and carry away, in and from our said forest and the limits thereof, all and all manner of beast and fowl of forest, red and fallow deer only excepted, and to keep and use all sorts of dogs, nets, and guns for that purpose, he always first acquainting the keeper of the walk where he intended so to hunt,” &c. “as aforesaid; provided always, that he did use the liberty thereby given to him with that moderation which was

fitting; and provided also, that the license of him the said Rt. Hon. T. G., Chief Justice," &c., "was brought to the next court to be held for our said forest to be there enrolled amongst the records of the said court: And whereas we have been further given to understand," &c., "that our Court of Attachment of our said forest of Waltham was held at," &c., "on," &c., (11th December, 1843,) "before you the said Henry John Conyers," &c., (naming the four defendants,) "then being present at the same court, and then and from thence hitherto and still being verderers of our said forest, being the next court \*held for our said forest after the granting of the said license by our said Rt. Hon. T. G.," [\*983 &c., "and that at the said court came the said E. J. W. by James Allsup, his attorney in that behalf, and then and there by the same attorney brought the said license to be there enrolled amongst the records of the said court, and then and there presented the same to you the said H. J. Conyers," &c., "and then and there by the same attorney besought and required you, the said H. J. Conyers," &c., "to enroll or cause to be enrolled the said license amongst the records of the said court there: but that you," &c.: the writ then averred neglect and refusal by the defendants to enroll, and commanded them "that, at our next Court of Attachment to be held of and for our said forest of Waltham, you do enroll or cause to be enrolled amongst the records of our said court there the said license so granted by our said Rt. Hon. T. G., Chief Justice," &c., "as aforesaid, to the said E. J. Williams as aforesaid, or that you show us cause," &c.

"Witness, Thomas Lord Denman, at Westminster, the 22d day of June, in the 8th year of our reign. By the court, ROBINSON."

Return. "We," &c., "certify and return," &c., "that the said forest of Waltham, in the said county of Essex, in the said writ mentioned, and the limits thereof, and the public waters thereof, were not, nor was either of them or any part thereof at the time of the granting of the said license in the said writ mentioned, nor are nor is the said forest and limits and public waters, or either of them or any part thereof, within any lordship, manor, reputed manor, forest, chase, park or warren of or belonging to the said E. J. Williams, or in which the said E. J. W. had, at the time \*of the granting of the said license, or now hath, any estate, right, title or interest whatsoever; nor was the said E. J. W., at the time of the granting of the said license, nor is he now, seised or possessed of, or entitled to, the said forest of Waltham, and the limits thereof, and the public waters thereof, or to the soil and land of or in the same, for any estate of freehold or other estate or interest whatsoever. And we," &c., "further certify," &c., "that the said license in the said writ mentioned, and the rights, liberties and privileges in the said license mentioned, and thereby assumed to be granted, extend and purport to extend over lands and waters in and over which the said E. J. Williams had not at the time of the granting of the said license, nor now hath, any" [\*984

lordship, manor, reputed manor, forest, chase, park or warren, or any estate of freehold, or other estate, right, title or interest whatsoever. And we," &c., further certify, &c., "that the said license in the said writ mentioned, and the rights, liberties and privileges in the said license mentioned, and thereby assumed to be granted to the said E. J. W., extend and purport to extend over certain lands lying and being within the said forest and limits thereof, to wit, over a certain close called and known by the name of Copt Hall Green;" and of a "certain other close called." &c., (naming other lands,) "all in the parish of," &c., "of which one Sir William Wake, baronet, was, at the time of granting the said license, and still is, seised for an estate of freehold in possession, and of which he the said Sir W. W., bart., then was and still is the occupier; and over a certain other close," &c., (naming other lands of which certain other persons respectively at the time of the grant of license, and still, were  
\*985] seised and the occupiers.) "And \*we," &c., further certify, &c.: then followed a statement, which it is unnecessary to insert at length, that, after the granting of the license, and before the Court of Attachment held on 11th December, 1843, to wit, on, &c., and on other days before the license had been brought by Williams or any other person to be enrolled, &c., and before any petition to the verderers touching the enrollment, Williams came upon the said forest of Waltham for the purpose of hunting and shooting in the said forest, and did hunt and shoot there and kill and carry away beasts and fowls of forest, &c. "And we," &c., further certify, &c., "that the said verderers have not nor have any nor hath either of them been required by the Warden, Chief Justice and Justice in Eyre, in the said writ mentioned, or by any justice or justices of the said forest of Waltham or of any forests or forest of our lady the queen, or by any rule, order, or decision of any court of justice seat or any court whatsoever of or for the said forest of Waltham, to enroll or cause to be enrolled among the records of the said Court of Attachment in the said writ mentioned, or of any court whatsoever, the said license in the said writ mentioned; nor hath any claim, complaint, appeal, reference or application whatsoever, touching the said license or the enrolling of the same, been made to the said Warden, Chief Justice and Justice in Eyre, or to such justices as aforesaid, or any or either of them, or to any such court of justice seat or other court whatsoever of or for the said forest, having appellate jurisdiction or any jurisdiction or authority whatsoever over, in or from the said Court of Attachment, or over the said verderers  
\*986] in the said writ mentioned. And for these \*reasons we cannot enroll or cause to be enrolled the said license," &c., "in manner," &c.

Demurrer, stating several causes. Those material to the decision on the return will appear sufficiently by the argument.

Joinder in demurrer.

The defendants stated, as one of their points for argument, "That the



writ of mandamus is bad, as having been issued, and been tested, out of term."

In last Hilary term, *Watson*, referring to the Regulation made by the judges of this court, under stat. 6 & 7 Vict. c. 20, s. 16, that "Every writ of mandamus shall be tested and made returnable on a day certain, before the Queen at Westminster," (a) obtained a rule to show cause why the mandamus should not be amended by altering the teste to a day certain in term. It appeared, by the affidavit on which the motion was made, that the mandamus was both tested and issued out of term, the special pleader employed in the case being of opinion that this course was permitted by the regulation above referred to.(b)

*T. C. Marsh*, in the same term, (January 24th,) showed cause against the rule to amend. A mandamus must be tested in term, Com. Dig. *Mandamus*, (C. 4); for the court has no authority to award process at any other time, nor is the sheriff bound to execute a writ "so awarded; [\*987 3 Bac. Abr. 377 (7th ed.,) *Execution*, (C): if tested out of term, it is a nullity, Com. Dig. *Abatement* (H 14); and the fault "shall not be amended; for it is not form;" Com. Dig. *ibid*, citing *Sympson v. Inhabitants of Penryth*, 1 Show. 80. Stat. 9 Ann. c. 20, by which (s. 7) the writs of mandamus there mentioned are brought within the protection of the statutes of Jeofails, is extended, by stat. 1 W. 4, c. 21, s. 3, to mandamus generally, but only so far as the enactments of stat. 9 Ann. c. 20, regard the "return to writs of mandamus, and the proceedings on such returns." And, supposing the statutes of Jeofails applicable to the defect as it appears on this writ, the fault here is not on the face of the writ merely; the affidavit shows that the mandamus was in fact issued out of term. The court would perhaps not attend to that circumstance if the writ were properly tested; but here the mandamus both purports to be, and is, issued in vacation. In *Kenworthy v. Peppiat*, 4 B. & Ald. 288, a bill of Middlesex made returnable on a dies non was considered absolutely void, and leave to amend was refused. In *Edgell v. Curling*, 7 Man. & G. 958, a subpoena duces tecum was held to be void, because tested in vacation. And in *Badham v. Bateman*, 2 Dowl. & L. 130, a distringas returnable out of term was set aside on an application made more than eight days after execution, on the ground that the writ was void and could not be amended. The court has always been guided, on motions of this kind, by the circumstance that there was something to amend by; *Green v. Rennet*, 1 T. R. 782: here that circumstance is wanting. The \*date of the rule absolute for a mandamus(c) [\*988 would not fix the time when the writ issued. The affidavit shows

(a) Reg. 8. Corner's Practice of the Crown Side of the Court of Queen's Bench, Forms, p. 2.

(b) The reporters have endeavoured without success to obtain a copy of the affidavit, and have reason to believe that the draft used in court was mislaid, and that no transcript had been made, but that the affidavit contained nothing material in addition to the particulars above stated.

(c) The rule in this case was made absolute on May 3d, 1844.

that a regular teste would be contrary to the fact: this therefore is not, as BULLER, J., said in *Green v. Rennet*, 1 T. R. 782, a motion "to amend" a "mistake according to the truth of the case." The practice as to amendment is stated in the late treatises on the practice of the Crown Office: (a) but nothing is mentioned that could warrant this application. [COLERIDGE, J. In *Regina v. The Mayor, &c. of Newbury*, 1 Q. B. 751, 759, cited by Mr. Archbold, (p. 311,) this court, during the argument, suggested an amendment of the writ.] The objection there was not one which made the writ void: and the suggestion of the court was not opposed. (b) The practice as to amending misprision of the clerk has no place where the defect proceeds, not from an oversight committed by a clerk of the court, but from a misconception of the special pleader. [COLERIDGE, J. It was also a mistake in the officer, to insert a date not according to the regulation of the court.]

*Watson and Bovill*, contra. The writ emanates from the court: and if the clerk annexes a wrong teste, it is not the less a misprision because the mandamus has been prepared in a pleader's chambers. The fault \*989] here is, in its nature, a misprision merely, produced by \*inserting one month instead of another; and no prejudice can arise from the amendment. The cases in which "misconveying of process" or "misprision of the clerk" may be aided by the court are pointed out in Com. Dig. *Amendment*, (C 2), (T); and in the division (C 2) it is laid down that, "if a venire facias or other process be tested before appearance or declaration, it shall be amended by the roll;" "so, if it be tested, *die dominico*;" "or, out of term, or after trial." In *Corner's Practice*, p. 233, it is said (citing *Regina v. Directors of St. Pancras*, (c) 1843) that "The court have allowed a writ of mandamus to be amended when the case has come on for argument in the crown paper, giving leave for the return to be amended also, or a new return to be filed." A bill of Middlesex was held to be amendable after it had been filed; *Green v. Rennet*, 1 T. R. 782. In *Rex v. Powell*, Bunb. 83, an extent was amended by completing the teste. The *Anonymous case* in Hardres, 321, as to amending a venire, *Bourchier v. Wittle*, 1 H. Bl. 291, where the teste of a capias was amended, *Smith v. Wilmer*, 3 Atk. 595; *Greenwood v. Richardson*, Barnes, 16; *Thorpe v. Hook*, 1 Dowl. P. C. 501; (d) 1 Roll. Abr. 207, tit. *Amendment*, pl. 16, and 1 Tidd, 713 (9th ed.,) are also among the authorities on this subject. If it is essential that there should be something to amend by, the clerk here may amend by the rule of court which ordered the mandamus to issue. As to *Edgell v. Curling*, 7 Man. & G.

(a) Archbold's *Practice of the Crown Office*, tit. *Mandamus*, p. 311, and *Corner's Practice of the Crown Side of Q. B.* 233, tit. *Mandamus*, were referred to.

(b) It was there understood that the prosecutor would have leave to amend, if necessary, on terms; and, to avoid delay, the argument was allowed to proceed as if the amendment had been made.

(c) Not reported.

(d) See *Eicknell v. Wetherell*, 1 Q. B. 914.

958, the court there refused to overlook a defect in the teste of a subpoena, when the consequence would have been to \*convict a party of contempt for disobeying a writ which was void when issued. [\*990  
*Seaton v. Heap*, 5 Dowl. P. C. 247, there cited, seems to have been a mere case of setting aside for irregularity. It is a fallacy to argue that this writ cannot be amended because in fact it issued after term. The writ is not the less a writ of the term because taken out in vacation. It is the well-known practice that, if a rule for a mandamus is granted on the last day of term, the writ, though subsequently issued, dates from the term. The court will be governed in this case by that which appears on the record. A mandamus has issued; the defendants have made a return; and they now allege that the mandamus is wrongly tested. [Lord DENMAN, C. J. You make the application to amend, when the return is ready to be argued.] It is because they have stated the objection in their points for argument. And, further, although *ex abundanti cautela*, this application has been made, it is not clear that the teste out of term, to a mandamus, is wrong. The words of the rule in question are only "on a day certain." In the preceding rules, 3 to 7, when a return is spoken of, the direction is, that the return shall be made on a day certain in the next ensuing term, or in the same or the next term, or in term or vacation: in no previous instance are the words so general as in rule 8: there is no ground, therefore, for concluding that in this particular instance a return in term is the only one permitted.

Lord DENMAN, C. J. I have a difficulty in acceding to the opinion that this rule may be made absolute. I \*think that the word [\*991  
 "misprision" means a mere mistake. The writ, here, being altogether void, it is at any rate a strong proposition to say that we shall make it good. Still, if the error were the act of the court, I would not pronounce that we might not do so: but this does not appear to be such an error, or to be a mistake of the clerk within the meaning of the authorities on this subject. I do not know that the clerk is bound to form an opinion on the accuracy of the teste; that is judged of by the party himself who instructs the clerk: and I do not think, if there is a mistake, that the clerk is bound to set it right. However, there may be cases which admit of the course now proposed; and it would sometimes be painful to prevent it. An excuse for it is furnished here by the language of the 8th Regulation, which speaks only of "a day certain," whereas, in the earlier rules, the mention of a "a day" has the words "in term or out of term," or something of the kind, tacked to it; and it may have been thought that when those words were not used the party was free to choose a day either in term or in vacation. Still I think that the wording of the 8th rule was not meant to alter the law, but that parties were intended in every instance to find out, for themselves, what the practice required. It also appears to me difficult to say, and the affidavit does not show, what there is to amend by. But the rest of the court think that the

application may be granted; and I agree with them in doing so, though protesting, as I am always disposed to do, against the practice of summarily altering a solemn act of the court.

PATTESON, J. The 8th Regulation directs, in general terms, that every  
 \*992] mandamus shall be tested on "a day \*certain." Before that rule, the court, in granting a mandamus, was understood to direct that the writ should issue, tested as of the day on which the rule was granted: and if the officer had fixed a teste of any different day, it would have been a mistake which the court might have corrected by its general authority, and not by force of any statute. But it is contended that, in this case, the rule having been misconstrued, the mistake is not with the officer of the court but with the party. The rule is not distinctly worded; and the officer acts upon the suggestion of a party who comes to him and desires the writ to be made out according to his own interpretation. Still, the officer is to use his discretion, and act according to the authority intrusted to him: and if he gives a wrong date to the writ, it is his own misprision; for he was not bound to adopt the view of the party suing out the mandamus. As to the real interpretation, we are agreed that the rule means a day certain in term, and does, in substance, direct that the writ shall issue on such day: and I think the relation between the time of granting the writ and the time of its issuing is not meant to be so entirely a fiction as has been suggested. I am therefore of opinion that the teste may be amended; and that, in the exercise of our general power, and not under any particular statute, we may make this rule absolute.

COLERIDGE, J. I think that we have here a discretion vested in us, and that we may amend where a mistake occurs which might be committed by a person using reasonable care, and is the error not of a party but of the officer. That seems to me to be the case here: and, in direct-  
 \*993] ing this amendment, I think we shall amend \*according to the fact; that is, the order of the court for issuing the writ. In practice, the mandamus is supposed to issue on the same day on which it is ordered by the court. Mr. *Robinson* says that, even when issued in a subsequent term, it is tested on that day of the former term on which the rule absolute was granted. We can, therefore, amend here according to the fact, because we know the day. It was contended that the mistake was that of the special pleader, not the officer; but the officer was bound to obey only the order and practice of the court. Then, lastly, the mistake was not so unreasonable as to preclude an amendment; for the officer, dealing with a new set of rules, not very clearly drawn, might fairly suppose that the words "a day certain," without more, were used in opposition to the words "a day certain in term."

The demurrer was then argued.(a)

Rule absolute to amend.

(a) For the crown, on the same day, before the same three judges. For the defendants, in Easter term, (April 25th,) before Lord Denman, C. J., Patteson, and Williams, J. (Wightman, J., was in the Bail Court.)

*Watson*, for the crown. The nature and origin of royal forests are detailed in Manwood's Treatise of the Forest Laws. (He then read the passages on this subject in the 4th (Nelson's) edition of Manwood, pp. 139, 140, 143, 145, 146, 147, tit. *Forests*, sects. 1, 2, 3, 13, 21, 22, 29, 32, 33.) The same treatise describes the office and jurisdiction of the Chief Justice in Eyre of the Forest, as to granting licenses, and otherwise. (*Watson* then read passages from Manwood, Nelson's edition, pp. 57, 58, tit. *Chief Justice in Eyre*, sects. 1, 2, 5, 28 : \*p. 65, tit. *The Charge*, sect. 1, [994 et seq.: pp. 188, 189, 192, tit. *Hunting*, sects. 21, 22, 36 : p. 332, tit. *Rolls of the Forest*, sect. 3: and the placita "*in itinere de Deane*," in 1 (W.) Jones, 347, 348: Manwood, (Nelson,) pp. 110, 115, tit. *Dogs in a Forest*, sects. 15, 37: pp. 20, 21, tit. *Assart*, sects. 7, 11: p. 307, tit. *Purpresture*, sect. 25: and *Mathewe's Case*, in 1 (W.) Jones, 276.

It is objected in the present case, that the license and the mandatory part of the writ are too comprehensive, inasmuch as they affect lands which, not being demense lands of the crown, are not within the jurisdiction of the Chief Justice and Justice in Eyre, and which are not lands of the prosecutor. But the license is at any rate good against the crown, and so far as the right of the crown extends. All the game belongs to the crown; but the king cannot license a person to take it on another's land, because in so doing he would be a trespasser; and this is the meaning of Manwood, p. 188, tit. *Hunting*, s. 21, where it is said that the king and the Chief Justice in Eyre may grant warrants to hunt in the forest, and license to hunt in the party's own lordship or manor, or his own freehold. So far, the license is available at once; and, if the licensee acquired the other land comprehended in the license, or obtained leave from the proprietor, it would then privilege him as to that. The present form of license has been used for a long course of years. And, if the license be defective in part, it may still be good for the residue. Lord Coke says in 4 Inst. 297: "If a man make a false claim" (before the court in Eyre) "by claiming more than he ought, he shall be fined for his false claim, but that which he ought to have shall not \*be seized: as the prior of York [995 claimed by charter to have tithe of all venison, tam in carne quam in corio, where he ought not to have it in corio, for which he was fined and enjoyed it in carne." The same point is mentioned in Manwood, p. 80, tit. *Claims in forests*, s. 5. Coke cites also *Pickering's Case*, 4 Inst. 297, before the Justices in Eyre, which was to a like effect. Further, the verderers are not competent to raise this objection to the license. They are ministerial and not judicial officers, except in the case of certain small offences. In other respects, Manwood says, their Attachment Court "is only a court of inquest; for an offender cannot be convicted here, neither can he be attached by his body, but by his goods, unless he is actually taken committing the offence in the forest:" and he adds, sect. 4, "Before the making Charta Forestæ, this Court of Attachments was held very often, but at no certain time, only at the will and

pleasure of the chief officers of the forest:" pp. 23, 24, tit. *Attachment Court*, sect. 34. Blackstone says (3 Comm. 71) that in the Court of Attachments "the foresters or keepers are to bring in their attachments, or presentments de viridi et venatione; and the verderers are to receive the same, and to enroll them, and to certify them under their seals to the Court of Justice-seat, or Sweinmote: for this court can only inquire of, but not convict offenders." In the case of a license, the duty of the verderers is to present at the Attachment Court. Manwood says, p. 384, tit. *Woods in forests*, sect. 46, that "though a man may cut his wood for necessary

996] boots, by view of foresters, and by virtue of such a warrant or license from the Chief Justice in Eyre; yet the officers ought to present it "at the next Court of Attachments, viz. how much was felled; and that it was done by the view of the foresters, that it may appear on record."

[COLERIDGE, J. It is not said there that the licenses are to be enrolled by the court.] The Chief Justice in Eyre may qualify the license by requiring enrolment. [COLERIDGE, J. Can he give a jurisdiction to the court for that purpose?] He has control over that court; and the verderers do not pretend that they have not authority. The case is like that of a mandamus to the steward of a manor to enrol a bargain and sale: there the court would not allow a return denying that the conveyance could operate. [PATTESON, J. The steward might return that it was not according to the custom.] But not that it was in itself inoperative. Several persons may claim to be admitted to the same copyhold, or to be sworn in as churchwardens for the same parish; the officer cannot reject any one because there is a question as to the title. When a charter, or the specification of a patent, is presented for enrolment, it has never been suggested that the officer might refuse because the charter or specification was invalid. It is objected that, if the verderers were bound to enrol the license, the Court of Justice-seat was the proper court to enforce performance of that duty. But, although claims to the allowance of liberties and privileges in the forest are tried in the Court of Justice-Seat,<sup>(a)</sup> the claim to a license, in which enrolling is made a condition precedent, cannot be tried there, nor redress had for interference with the enjoyment under such license, if the verderers refuse to enrol. The objection that

997] there is a tribunal other than "this court, by which redress may be granted, comes too late on return to a mandamus. And no actual sitting of a Court of Justice-seat has been traced since those mentioned by Sir W. Jones. (The rest of the argument, not bearing on the points decided by the court, is omitted.)

*T. C. Marsh* contra. First: This mandamus cannot be sustained, as it directs the enrolment of a license which is clearly bad, and has issued improvidently. It is license to hunt and shoot over lands, a portion of which are owned and possessed by private proprietors: as to that part, it is inoperative: and there cannot be a mandamus to enrol an instrument

(a) 4 Inst. 291.



which purports to do more than it can legally perform. If this license were granted by the crown, and enrolled, although the crown exceeded its right in granting it, no private person could prevent the enjoyment of it.

Secondly: Mandamus is not the proper remedy; for that writ will not issue to compel an inferior officer to obey a superior, where the superior has power to enforce obedience, and has not been duly applied to by the prosecutor: *Rex v. Bristow*, 6 T. R. 168; *Rex v. Jeyes*, 3 A. & E. 416; *Regina v. Gamble*, 11 A. & E. 69; Com. Dig. *Mandamus*, (B); 5 Bac. Abr. 260, 261, tit. *Mandamus*, (B). *Rex v. Chancellor, &c. of Cambridge*, 1 Stra. 557; S. C. 2 Ld. Raym. 1334, (*Dr. Bentley's case*), seems referable to the same principle. *Regina v. Kendall*, 1 Q. B. 366, which may be cited on the other side, proceeded on the ground that there was no other remedy. Here there is a specific remedy. There is a regular gradation of forest \*courts, from the "Court of Attachment" to the "Justice-seat;" [998 Manwood, Laws of the Forest, ch. 21, 22, 23, 24:(a) and the Chief Justice in Eyre has authority to impose fines and forfeitures on verderers for neglect of duty, and inter alia, for not bringing in the rolls and presentments of the forest; Manwood, p. 506, ch. 24, s. 5, 4 Inst. 291. So that the authority of the Court of Queen's Bench to enforce an enrolment in this manner could not begin till the Chief Justice in Eyre had himself refused to hold a court for the purpose. Consequently, in the copious reports extant of cases on the forest law, there is no instance in which this court has been moved to compel verderers to perform their duties, but several in which the jurisdiction of the King's Bench in forest causes has been denied; Case of *Hundred of Wargrave*, 1 W. Jones, 267.

*Watson*, in reply. The license may be taken as meant to include that portion of the forest only over which the crown had a right to grant it: and the party who uses it over the soil of other owners may then be a trespasser *ab initio*: and in this manner the passage in Manwood, pp. 288, 289, ch. 18, s. 7, 3d ed., may be understood. The license is not illegal, but inoperative only, even as to the defective part. But this point cannot at all events be now raised by the defendants; for the license must be enrolled before it can be judged whether it be good or bad. The question, whether mandamus is or is not the proper remedy, ought to have been raised in showing cause against the rule, not on the return. But it has not been shown that there is any \*available remedy. [999 It does not appear from Manwood that any power exists in the Justice-seat to compel the verderers to enrol a license. They are, indeed, compellable to bring in their roll; but the prosecutor cannot enforce even this, till he has, in the first instance, procured enrolment.

*Cur. adv. vult.*

(a) Marsh cited the 3d edition, pp. 400, et seq.

Lord DENMAN, C. J., in this vacation (May 4th) delivered the judgment of the court.

A mandamus issued to the verderers of Waltham Forest, to enrol in the Forest Court a license granted by the Chief Justice in Eyre to kill game within the forest.

We have heard in this case a great deal of ingenious argument upon points of curious learning: but two matters occurred to us as raising objections to the writ's issuing, on which we received no satisfaction.

The license was admitted to be void in part; that is with respect to the right of sporting over the lands of private proprietors. But, if good with respect to the royal lands, the learned counsel argued that we ought to command the enrolment, that it might operate as far as it is legal. We feel, however, an insuperable difficulty in directing the enrolment of an instrument which in its terms would give power to commit unlawful acts. We called for authority to this effect, and none was found.

The other objection is, that the verderers are officers of the court of the said Chief Justice in Eyre, and he must in that character have power to compel them to do what the law requires. This court is not to be used  
 \*1000] as an instrument for enforcing the process \*of any other court, at least without a case of urgent and imminent necessity, which cannot be pretended here. Judgment for defendants.

### HOLFORD against BAILEY.

A declaration, reciting that defendant had been summoned to answer plaintiff in an action of trespass, charged that defendant, with force and arms, broke and entered a fishery, to wit, the sole and exclusive fishery of plaintiff, in a certain part of a river then flowing and being over the soil of one F., and then fished for fish in the said fishery of plaintiff, and the fish of the said fishery of plaintiff, there found, and being in the said fishery, chased and disturbed: Conclusion, contra pacem.

*Held*, on motion in arrest of judgment, after verdict for plaintiff:

- (1.) That the declaration was shaped in trespass.
- (2.) That (*Semble*) trespass lies for breaking and entering the several fishery of A. on the soil of B. But
- (3.) That the words "sole and exclusive fishery" were not equivalent to "several" fishery; and that no cause for an action of trespass appeared.

THE declaration stated that the defendant had been summoned to answer the plaintiff in an action of trespass; and it contained four counts.

The first count was for breaking and entering, with force and arms, &c., a several fishery of plaintiff in the river Usk, in Brecknockshire.

The second count charged that the defendant, to wit, on, &c., with force and arms, &c., broke and entered a certain other fishery, to wit, the sole and exclusive fishery of the plaintiff, to wit, in the said river Usk, in a certain other part of the said river then flowing and being over the soil of one Philip Francis, and adjacent to, &c., situate in the said county,

and then fished for fish in the said last-mentioned fishery of the plaintiff, and the fish, to wit, five salmon, &c., of the said last-mentioned fishery of the plaintiff, there found, and being of great value, to wit, &c., then being in the said last-mentioned fishery, then chased and disturbed.

The declaration concluded: "and other wrongs to \*the plaintiff then did, against the peace of our lady the queen, and to the plaintiff's damage," &c. [\*1001]

Ten pleas were pleaded, leading to issues of fact.

On the trial, before PARKE, B., at the Gloucestershire Spring Assizes, 1844, the defendant obtained a verdict on issues disposing of the first, third, and fourth counts; and the plaintiff had a verdict on all the issues relating to the second count.

In Easter term, 1844, *Kelly* obtained a rule nisi for arresting judgment on the second count, on the ground that it was shaped in trespass, and that trespass did not lie for an injury to the several fishery of the plaintiff on the soil of a third person; and that, assuming that it did lie, the second count did not assert a several fishery, the words "sole and exclusive" not being equivalent to "several."

In last Trinity term, (a)

*Talfourd*, Serjt., *Alexander* and *E. V. Williams* showed cause.

It is not to be assumed that the second count is in trespass: the record does not show the form of the action. [*Kelly*. The declaration recites that the defendant has been summoned to answer in an action of trespass.] When the record is made up, that need not appear, since the rule of Hil. 4 W. 4, Forms, No. 1, 5 B. & Ad. x, xi; *Ball v. Hamlet*, 1 C., M. & R. 575; S. C. 5 Tyrwh. 201. Before the new rules, in *Anderson v. Thomas*, 9 Bing. 673, it was held that not to state fully the form \*of action was only an irregularity: and the words "of a plea that he render to him the sum of 7750*l.*," in bill for debt, were [\*1002] held to be superfluous: *Lord v. Houstoun*, 11 East, 62, recognised in *Ferguson v. Mitchell*, 2 C., M. & R. 687, 689; S. C. Tyrwh. & Gr. 179, 181, where PARKE, B., said that, since the new rules, no recital of the writ was necessary in making up the issue. The other counts cannot be looked to: at this stage no objection can be taken on the ground of a misjoinder. The second count has indeed the words "with force and arms:" but these may be inserted in a count in case, as was pointed out by *Williams*, Serjt., arguendo, in *Woodward v. Walton*, 2 New R. 476, 478. It is true that MANSFIELD, C. J., there says that the words are generally applicable to actions of trespass only;" but the authorities do not bear this out. In *The Earl of Shrewsbury's Case*, 9 Rep. 46 b, 50 b, the court said: "When there are two causes of an action on the case, the one *causa causans*, and the other *causa causata*; *causa causans* may be alleged to be *vi et arm'*, for that is not the immediate cause or point of the action, but *causa causata*, as in 12 H. 4, 3 a, Yearb. Mich. 12 H. 4,

(a) May 29th, 1845. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Ja.

3 A. pl. 4, the putting of dung into the river is *causa causans*, and therefore it may be *vi et armis*, but *causa causata*, s. the point of the action on the case is the drowning of the plaintiff's land:" and other instances are given: and this passage is referred to in Com. Dig. *Action upon the Case*, (C 3), (C 4). At the utmost, the words are only matter of special demurrer, within stat. 4 Ann. c. 16, s. 1: and judgment cannot be \*1003] stayed after verdict on the ground of a variance between \*the writ and declaration; stat. 5 G. 1, c. 13, s. 1. In *Bowdell v. Parsons*, 10 East, 359, the former statute was applied to a motion in arrest of judgment: and Lord ELLENBOROUGH pointed out that the omission of a venue was less material than other instances given in the statute, of which the improper omission of *vi et armis* is one. The law as to such variations between the writ and declaration, and the mode formerly allowed of taking advantage of them, appear in note (3) to *Redman v. Edolph*, 1 Wms. Saund. 318. If the record shows that the action is substantially in case, the count will be treated as so shaped. In *Hudson v. Nicholson*, 5 M. & W. 437, it was held that, where a wrong was stated which was a cause of trespass, the declaration might, after verdict, be considered as shaped in trespass, though the words *vi et armis* were omitted. *Brown v. Boorman*, 11 Cl. & Fin. 1, affirming *Boorman v. Brown*, in Exch. Ch., 3 Q. B. 516, is an affirmance of this principle.

But, next, the count discloses a wrong which is properly the subject of an action of trespass. It complains of a breaking and entering of the plaintiff's several fishery. An objection will be made, that, instead of the word "several," the count has only the words "sole and exclusive." Now the old Latin word is "separalis," which is more correctly rendered by the words "sole and exclusive" than by the word "several." In *Rogers v. Allen*, 1 Campb. 309, 314,(a) the language of the replication was "sole and exclusive liberty and privilege of fishing:" and this was treated as a description of a several fishery. In *Gips v. Wollicot*, Comb. \*1004] 433, 434, 464, ROOKBY, J., said: "Separal' Piscaria \*is where no one else hath libertatem piscandi:" that exactly answers to the words "sole and exclusive." But, as will be shown afterwards, if there be a difference between the word "several" and the words "sole and exclusive," it is in favour of the plaintiff here: for, the question having often been how far "several" implies an exclusive right, the difficulty is here avoided, by substituting for that word a phrase which expresses exclusive right.

Then the main question is, whether trespass lies for breaking and entering a several fishery which the plaintiff has in the soil of another. In *The Duke of Somerset v. Fogwell*, 5 B. & C. 875, the owner of a several fishery, in a navigable river where the tide flowed and ebbed (in which therefore he had not the soil,) succeeded in an action of trespass; the defence relied

(a) At p. 309, the words of the replication are stated to be, "sole, several, and exclusive liberty and privilege," &c.

upon being that the owner had demised the right, which defence failed for want of a grant under seal. BAYLEY, J., there adopted the doctrine from Co. Lit. 4 b, (disputed by HOLT, C. J., referring to Co. Lit. 122 a, in *Smith v. Kemp*, 2 Salk. 637,)(a) that, “if a man be seised of a river, and by deed do grant *separalem piscariam* in the same, and maketh livery of seisin *secundum formam chartæ*, the soil doth not pass, nor the water, for the grantor may take water there; and if the river become dry, he may take the benefit of the soil; for there passed to the grantee but a particular right, and the livery being made *secundum formam chartæ*, cannot enlarge the grant.” Again, in Co. Lit. 122 a, \*it is said: [\*1005 “a man may prescribe to have *separalem piscariam* in such a water, and the owner of the soil shall not fish there; but if he claim to have *communiam piscariæ*, or *liberam piscariam*, the owner of the soil shall fish there.” In Hale, *De Jure Maris*, p. 5, it is said: “one man may have the river, and others the soil adjacent; or one man may have the river and soil thereof, and another the free or several fishing in that river.” In *Alderman de Londres v. Hasting*, 2 Sid. 8, the plaintiff, being owner of a several fishery in alieno solo, recovered in trespass against a party fishing therein. If a several fishery could not exist in alieno solo, such a term of art could never have been employed; for the ownership of the soil would be the only matter in question. The question, whether there can be such a right, arose in *Seymour v. Lord Courtenay*, 5 Burr. 2815: it had been held, at Nisi Prius, that the grant proved was not of a several fishery; but the court, thinking the exception in the grant, which was relied upon, not sufficient to prevent the plaintiff from claiming a several fishery, granted a new trial. There the action was trespass for disturbing the plaintiff’s several fishery in alieno solo; but the point now made was not taken. Wherever a subject has a several fishery in an arm of the sea, as he may have by grant of the crown made before Magna Charta, he has it without the soil, which is in the crown. Now a subject may prescribe for a several fishery in an arm of the sea; *The Mayor of Orford v. Richardson*, 4 T. R. 437, where the action was shaped in \*trespass. The judgment in that case was reversed on error; [\*1006 *Richardson v. Mayor of Orford*, 2 H. Bl. 182; S. C. 1 Anstr. 231; but no question was made as to trespass being maintainable for fishing in the plaintiff’s several fishery in alieno solo. *Rogers v. Allen* is to a similar effect.(b) *Patrick v. Greenway*,(c) is an express decision in favour of the plaintiff here: in that case, as here, it was not averred that any fish had been taken. In *Kinnersley v. Orpe*, 1 Doug. 56, it was considered that the point was unsettled.

The authorities which may be cited in support of the rule, are the fol-

(a) See Eyre, J. ib. E. V. Williams pointed out that, in this report, the references to Fitzherbert and the Yearbook were incorrect and should be, Fitz. N. B. 88, G., H., and Pasch. 46 E. 3, fol. 11 A, pl. 8. See S. C. Holt, 322; Carth. 285; 4 Mo. 1. 187; Skinner, 342.

(b) 1 Campb. 309.

(c) Note (2) to *Mellor v. Spateman*, 1 Wms. Saund. 346 b.

lowing. In 2 Blackst. Com. 40, it is said: "he that has a several fishery must also be (or at least derive his right from) the owner of the soil, which in a free fishery is not requisite." The words in the parenthesis are not in the earliest edition; and the passage may therefore perhaps be relied upon for the defendant. But the parenthesis represents the proper limitation. In Bracton, fol. 208 b, lib. 4, c. 28, s. 4, it is said: "si tantum ex alterâ parte prædia possideat prope ripam, tenementum suum erit usque ad filum aquæ et sua erit piscaria et jus piscandi sine alio, nisi fortè ita sit quòd servitutem imponat fundo suo, quòd quis posset piscari cum eo, et ita in communi, vel quòd alius per se ex toto." It rather seems that Blackstone meant to express by "free fishery" what is properly expressed by "several fishery;" a little earlier he speaks of a free fishery as exclusive; and apparently he is distinguishing between grants

\*1007] by the crown and grants by a subject. *Gips v. Wollicot*, Comb. 433, 464; S. C. 3 Salk. 291; Holt, 323, (which will be cited,) is reported in several places; the best report is in Comberbach; from which it appears that the point decided related only to a free fishery: for, the action being in trespass for breaking a several fishery and a free fishery and taking fish, the defendant had a verdict on Not guilty, as to the several fishery: and he succeeded as to the rest, because it was not laid that the fish were the fish of the plaintiff. But in Holt's Reports, Lord Holt is reported as saying: "It has been lately adjudged, that a separate fishery and free fishery are all one; and if he had the land covered with water, why should he not have the fishery? By the grant of it, the soil passes; and there is a difference between a fishery and a free warren. I am of opinion, that where the owner of the soil hath a right to fish with others, he may have an action of trespass, though it doth not lie for one who has but a liberty to fish; and although he might have *clausum fregit, et in aquâ sua piscatus*, yet I think trespass lies: And if it be not proved otherwise, we will intend it his separate fishery of common right." But there is now no doubt of the distinction between a several fishery and a free fishery: they are distinguished by Lord Holt in the case before cited, of *Smith v. Kemp*, 2 Salk. 637; S. C. Holt, 322; Carth. 285; 4 Mod. 187; Skinner, 342, though he there said that in *separalis piscaria* he who had the fishery was owner of the soil. In the last case, and elsewhere, it is laid down that *liberum tenementum* is a good plea, meaning, it seems, *liberum tenementum* in the soil. But that plea is notoriously an anomaly; and a prescription to fish, or a grant, may be replied; Chitty on the Game

\*1008] \*Laws, 295, and the opinion of Wood, B., there. In Hargrave's note (7) to Co. Lit. 122 a, the authorities are collected: and the result, in Mr. Hargrave's opinion, appears to be that there may be a several fishery, as well as a several pasture, without the soil. Whether that should be called "several" or "free," is, after all, a question of terms, which is here avoided, inasmuch as the words used are "sole and exclusive." It follows that an invasion of the right is the subject of an ac



of trespass. Trespass lies for a wrong to a liberty or privilege in land, as, *quodd separalem vel liberam piscariam suam fregit, et piscatus est*; Com. Dig. *Trespass*, (A 2.) The liberty there referred to is a sole and exclusive liberty; for reference is made to Fitz. N. B. 87 G, in which place it is said: "A man may have a writ of trespass for fishing in his several piscary." In *Upton v. Dawkin*, 3 Mod. 97, judgment was arrested, because the plaintiff declared in trespass, for entering his free fishery, and taking his fish: the word "free" was there taken as not signifying "sole and exclusive." In Yearb. Pasch. 46 Ed. 3, fol. 11 A, pl. 8, trespass was brought for fishing in plaintiff's free fishery; and the defendant justified as the servant of the party who had the freehold of the locus in quo: issue was joined on the property in the free fishery: but it does not appear that any thing was decided: it is clear, however, from the report that the free fishery was not a several fishery in the soil of the plaintiff. In Yearb. Trin. 10 H. 7, fol. 24 B, pl. 1, 26 B, pl. 5, liberum tenementum was pleaded to trespass for fishing in plaintiff's several fishery. The plea was objected to; but it does not appear what was decided.<sup>(a)</sup> In an *Anonymous* case in *Keilwey*, (53 b, 19 H. 7,) to trespass for fishing in plaintiff's [1009 several fishery the defendant pleaded that the locus in quo was an acre of land covered with water, and the freehold of the defendant; and it was objected that the plea was bad, because the action was for the liberty, not the soil, and the proper form in an action for the owner of the soil was trespass *quare vi et armis stagnum suum fregit et intravit*: and to this the court inclined: but the report says that in the Queen's Bench, 8 H. 8, all the judges were clearly of opinion that such a plea was good and would drive the plaintiff to reply. In *Aston's Entries*, 508, is a declaration in trespass, vi et armis, for fishing in a several fishery, where it is clear that the soil was not the plaintiff's but part of a seaport. In *Carter v. Murcot*, 4 Burr. 2162, the plaintiff succeeded on a prescription for a several fishery in a navigable river. In *Lord Paget v. Milles*, 3 Doug. 43, the plaintiff brought trespass for fishing in his several fishery, and recovered, though he had conveyed the water to the defendant. In *Bagott v. Orr*, 2 B. & P. 472, 479, and *Vivian v. Blake*, 11 East, 263, (recognised in *Benett v. Coster*, 1 Br. & B. 465, it seems to be taken for granted that a subject may have an exclusive right to take fish on the sea shore. In 2 Roscoe on Actions relating to Real Property, p. 664, it is said: "the owner of a free warren, which is a liberty to hunt in another man's ground, may, as it seems, maintain trespass for an injury to such exclusive privilege:" and in the note (k) it is added: "if free fishery be synonymous with common of fishery, trespass would not lie; but [1010 otherwise, if it signify an exclusive right." It must be admitted that the authority of Com. Dig. *Trespass*, (B 1,) is against the defendant: it is there said that "he who has a warren in land" shall not have trespass. The reference given is to *Welden v. Bridgewater*, Cro. Eliz. 421, where nothing appears except a dictum by counsel, citing Yearb. Hil. 5 H. 7,

(a) See Yearb. Trin. 10 H. 7, fol. 28 B, pl. 22

fol. 10 B, pl. 2, in which, however, the contrary is assumed : “un home aura action de *trespas vi et armis, quare in warennam suam intravit*, nient contristant que franktenement soit in le def. del’ soil : car il ne porte action de franktenement de soil, mes p’ le warren, de quel le defendant n’ad a mesler.” Lord *Dacre v. Tebb*, 2 W. Bl. 1151, is an instance of such an action. A warren, in this respect, cannot be distinguished from a fishery. So in *Wilson v. Mackreth*, 3 Burr. 1824, the plaintiff recovered in trespass quare clausum fregit in respect of his right to cut turves in alieno solo ; and YATES, J., said : “wherever there is an exclusive right, trespass lies.” No precedent of an action on the case can be cited. Instances, such as *Weld v. Hornby*, 7 East, 195, where the act is done without the limits of the fishery are of course inapplicable. It is true that it is not here alleged that the fish were taken : but the action for trespass lies, because the plaintiff’s right is put to hazard. If he had discontinued the right of fishing merely at the particular moment, that is of no importance ; *Bower v. Hill*, 2 New Ca. 339.

*Kelly, Chilton, Whateley, Keating, and J. Gray*, contrà. First, it is \*1011] true that the allegation of the plaintiff being \*summoned to answer in an action of trespass might have been omitted ; but, as the plaintiff has inserted it, it ought to bind him. And the count of itself shows that the action is trespass : the fact is laid as done with force and arms and against the peace. The omission of the words “force and arms” may be curable by verdict ; but that does not render them unmeaning when they appear. “Breaking and entering” cannot be descriptive of a wrong which is the proper subject of an action on the case.

Secondly, the words “sole and exclusive fishery” are not known to the law. “Words used as terms of art ought to be observed ;” Com. Dig. *Parols*, (A 2.) The recognised translation of “separalis” is “several.” Could a warrant be claimed by such words as these ?

Thirdly, trespass does not lie for invasion of a plaintiff’s fishery in alieno solo. It may be admitted that a party may have a several fishery in alieno solo : the authorities cited to that point need not, therefore, be discussed. But trespass will not lie for the invasion of such a right, unless the plaintiff’s fish be taken. The fact that the existence of such a fishery apart from the soil has been doubted shows that trespass could never have lain for it. *Primâ facie*, the right to the fishery implies right to the soil : *Throckmerton v. Tracy*, Plowd. 145, 154 ; 34 Assis. 207 B. pl. 11, *Case of the Bann Fishery*, Dav. 55 a, b. When the two concur, trespass will lie ; but not for the fishery alone : this appears from the instances cited in Hargrave’s note (7) to Co. Litt. 122 a. It is a mere profit à prendre, for which trespass lies not ; 20 Vin. Abr. 442, *Trespass* (H), \*1012] pl. 9. *Seymour v. Lord Courtenay*, 5 Burr. 2815, \*has been cited ; but the record in that case has been inspected, and it appears that one count was for trespass to the soil, and, in all the counts alleging a several fishery, it was charged that the plaintiff’s fish had been taken. For that an action of trespass lies : 7 Bac. Abr. 677, 7th ed.,

tit. *Trespass*, (F); *Child v. Greenhill*, Cro. Car. 553; S. C. 1 (W.) Jones, 440; *Hevel v. Reynolds*, 2 (T.) Jones, 109; S. C. 1 Vent. 329; but it does not lie unless the fish be the plaintiff's; Yearb. 36 H. 6, fol. 24 A, pl. 19. In *The Duke of Somerset v. Fogwell*, 5 B. & C. 875, the plaintiff recovered on the second and fourth counts only. The fourth count was de piscibus asportatis. The second is reported to have been "for breaking and entering the several fishery of the plaintiff in the river Dart." This count is not fully set out; though an argument arises in favour of the present defendants from the fact that it was there assumed that, if the fishery were distinct from the soil, it was incorporeal. But the point here in question was not discussed: nor was it brought before the court in *The Mayor of Orford v. Richardson*, 4 T. R. 437; *Rogers v. Allen*, 1 Campb. 309; or *Patrick v. Greenway*, note (2) to *Mellor v. Spateman*, 1 Wms. Saund. 346 b. But *Gips v. Wollicot*, Comb. 433, 464; S. C. 3 Salk. 291, Holt, 323, is a direct authority for the defendant. In Comberbach's report, Holt, C. J., is represented (p. 434) to say: "bringing trespass for fishing in libera piscaria seems to imply a right in the soil." So, from the report in Salkeld, Holt appears to have considered that, if the soil were not in the plaintiff, trespass could not lie unless his fish were taken. In *Smith v. Kemp*, 2 Salk. 637; S. C. Holt, 322; Carth. 285; 4 Mod. 187; Skinner, 342, it appears that the objection was that "libera piscaria" showed no right in the soil; but Lord Holt, after saying that in the case of a several fishery he who had the fishery was owner of the soil, said that the grantee of a free fishery had a property in the fish; that is, when taken, for the action was for taking the fish. It seems clear that the owner of a several fishery has not, as such, any property in the fish till taken; if he had, the fish would be his though they passed without the limits of the fishery, which is contrary to *Regina v. Steer*, 3 Salk. 189, 291: and it is doubtful whether he has a property even in the water, for he could not sue a stranger for bathing. The cases are collected in Woolrych's Law of Waters, &c., p. 86, &c., ch. 5. In *Rex v. Old Alresford*, 1 T. R. 358, ASHHURST, J., said: "there is no doubt but that a fishery is a tenement. Trespass will lie for an injury to it; and it may be recovered in ejectment." But there the court held that the soil must be presumed to have passed. [PATTERSON, J. Then the language is strange: the ejectment would be for the land, not the fishery.] For the piscary itself ejectment does not lie: *Molineux v. Molineux*, Cro. Jac. 144, 146; *Herbert v. Laughluyn*, Cro. Car. 492. No instance will be found in which it has been distinctly ruled that trespass will lie, where neither the plaintiff's fish have been taken nor the soil has been in the plaintiff. In Fitzherbert, Nat. Br. 88; G, the writ is for fishing and taking fish, with injury to the soil. The same observation applies to the writs in Reg. Brev. 94 a, 95 b. The plea of liberum tenementum is accounted for, if the soil be claimed: and the replication of prescription for fishing may be considered as in the nature of a plea of estoppel, precluding the defendant, who

claims under a supposed grantor, from denying the right to the soil. Where it is said that there may be a freehold in a piscary, as in *Fitz. Abr. Assise*, 76 a, pl. 422, the meaning is either that the owner has the land, or that it is appendant or appurtenant to land: *Fitz. N. B.* 179, L.; *Yearb. Hil.* 18 H. 6, fol. 29 B, pl. 2; *Yearb. Mich.* 34 H. 6, fol. 28 A, pl. 9; 2 *Bro. Abr. Trespass*, 289 a, pl. 336. So ejectment does not lie for the water, without the soil: *Challenor v. Thomas*, *Yelv.* 143. The mere disturbance of fish is properly a subject of an action on the case, like disturbance of a decoy: *Carrington v. Taylor*, 11 *East*, 571; *Keeble v. Hickeringill*, 11 *East*, 574, (note.) So case was brought for disturbing a rookery: *Hannam v. Mockett*, 2 *B. & C.* 934. But here, the fish not being the fish of the plaintiff, no action will lie in respect of them alone: *Pritchard v. Long*, 9 *M. & W.* 666. The disturbance, in trespass, is mere aggravation, as appears from *Chamberlain v. Greenfield*, 3 *Wils.* 292, (where *Newman v. Smith*, 2 *Salk.* 642, was relied on,) and *Lockwood v. Stannard*, 5 *T. R.* 482. *Cur. adv. vult.*

Lord DENMAN, C. J., in this term (May 4th) delivered the judgment of the court.

The declaration in this case states that the defendant, with force and arms, broke and entered the sole and \*exclusive fishery of the plaintiff in the river Usk, being the soil of A., and disturbed plaintiff's fish there.

It is moved in arrest of judgment, after verdict for the plaintiff, that trespass will not lie in such a case.

Two answers are made. First, that the declaration does not necessarily and conclusively appear to be in trespass, but may, after verdict, be taken to be a declaration in an action on the case. Secondly, that if it be trespass, still an action in that form will lie for an entry on the several fishery of the plaintiff, though the soil be in another person, and though no fish be taken.

As to the first answer, we are clearly of opinion that the declaration, even after verdict, must be treated as a declaration in trespass. It has all the forms of a declaration in trespass. It charges the injury directly without any *quod cum*; it states it to have been committed with force and arms; and concludes *contra pacem Reginae*. To hold this to be an informal declaration in case, would be to confound all distinctions in pleading relating to these two actions, and would be quite contrary to long established usage.

The cases cited on this part of the case do not at all bear out the contrary view. The last case is *Lear v. Caldecott*, 4 *Q. B.* 123, where a count was held to be in case and not in trespass: but there it was joined with several others clearly being in case, and was manifestly intended to be so framed in itself.

The second point is the real one in the case.

On the part of the defendant, it is objected that the declaration does not allege a trespass in the "several" fishery of the plaintiff, *eo nomine*, but in

the "sole and \*exclusive" fishery. For the plaintiff it is said that the English word is not material, and that "sole and exclusive" [\*1016 is as good a translation of *separatis* as "several." We will assume, for the moment, that the plaintiff is right, and treat this as an allegation of trespass in a *several* fishery.

No doubt the allegation of a *several* fishery, *prima facie*, imports ownership of the soil, though they are not necessarily united: and, therefore, in most cases, the action is properly brought in trespass. Again, the declaration generally alleges the taking of the plaintiff's fish, which is clearly the subject of an action of trespass. It was so in the two leading cases of *Seymour v. Lord Courtenay*, 5 Burr. 2814,(a) and *The Duke of Somerset v. Fogwell*, 5 B. & C. 875. These cases are, therefore, no authority whatever upon the present point. Neither is the case of *Smith v. Kemp*, 2 Salk. 637; for there the declaration was for taking the fish. The same observation applies to *Gibbs v. Wooliscott*, 3 Salk. 291, and to many other cases.

Some of the cases from the Year books, which are collected in Mr. Chitty's book on the Game Laws, have the same allegation of taking the fish; and, wherever that is so, they cannot be considered as in point. Others apparently have not that allegation; and the point generally raised seems to have been whether *liberum tenementum* was a good plea to an action of trespass for breaking and entering the *several* fishery of the plaintiff: and it seems to have been held (though it is very difficult to tell what, or whether any thing, was decided in several of the cases) that *liberum tenementum* was a good plea, and that the plaintiff must reply and \*show how he had a *several* fishery. Now, if this be [\*1017 so, it implies that trespass will lie for breaking a *several* fishery when the soil is in another: for, if not, no replication could be good to a plea of *liberum tenementum* except a direct traverse of it, unless indeed there could be a demise by the owner of the freehold to another, giving him the right to fish, which might operate as a *several* fishery, which does not seem to be anywhere surmised. For the plea, if undenied, and the declaration, together, would amount precisely to the present declaration, that is, trespass for a *several* fishery in *alieno solo*. If, therefore, the present declaration be bad on the ground that trespass will not lie, the plea being undenied in the case supposed would make the declaration bad there also. Yet we find no allusion to any such supposed consequence. Neither in any of the cases in the Year books is the point directly raised, whether the particular action of trespass will lie where the *several* fishery is in one and the freehold in another, a state of things which it is admitted may exist. It should appear that trespass will lie for free warren in *alieno solo*: and no satisfactory reason is assigned for distinguishing that from the present case. Added to all which, there is a total absence of any trace of an action on the case brought for disturbing a *several* fishery.

(a) See *antè*, pp. 1011, 1012.



For these reasons, we are inclined to think that trespass will lie for disturbing a several fishery in alieno solo.

But then the declaration must describe it properly. The whole question is technical; and we think that the proper technical description ought to be given. The word "several," as applied to a right of this  
 \*1018] sort, has acquired a meaning supposed to be understood and quite technical, ever since the pleadings were in English, being clearly the same and no other meaning than the word "separalis" had before, and which word only is to be found in the old entries. No other word appears ever to have been used. The words "sole and exclusive" may be capable of having the same meaning; but they may have a very different meaning. They would probably be satisfied by proof of a license from the owner of the freehold for an hour to the exclusion of himself and all other persons: at all events they are new words, hitherto not applied to a subject of this sort; and we cannot say that they necessarily describe a "several" fishery. Nor is this matter of special demurrer only; it is matter of substance; and we feel ourselves bound to arrest the judgment for want of a description in the declaration of a *several* fishery eo nomine.

Rule absolute.

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It may be convenient to mention here the following Order, which was drawn up by Wightman and Erle, Js., and Parke, B., at the request of the Judges of the Queen's Bench. Common Pleas and Exchequer, and posted at the Judges' Chambers, bearing date June 12th, 1845.

“ORDER OF THE JUDGES.

“We have considered the means best calculated to prevent parties from fraudulently obtaining Judges' orders for signing judgment, and recommend that the following precautions be adopted:—

“That all written consents, upon which such orders are obtained, shall be preserved in the Chambers of the respective Courts.

“That in actions where the defendant has appeared by attorney, no such order be made, unless the consent of the defendant be given by his attorney or agent.

\*1019] “That, where the defendant has not appeared, or has appeared in person, no such order be made, unless the defendant attends the judge and gives his consent in person, or unless his written consent be attested by an attorney acting on his behalf; but we think that these precautions are unnecessary where the defendant is a barrister, conveyancer, special pleader, or attorney.

“We think that *Sunday* ought to be counted as one of the four days between the delivery of paper books and the day of argument; except it is the last, when it is to be omitted, according to the general rule.”

“The document, as above stated, is in 14 M. & W. p. 353. In *Dixon v. Sladdon*, 15 M. & W. 427, Exchequer, Easter term, (May 7th,) 1846, a question arose whether the order, as to signing judgment by consent, was equivalent to a rule of court; and Parke and Rolfe, Bs., said that it was not. Rolfe, B., said: “The judges requested three of their body to consider how this matter might be best regulated, and they produced that order.” Parke, B., added: “There was some doubt among the judges whether orders for judgment ought to be made on consents of this kind, but it was thought advisable to sanction them, as in many cases they might prove a great saving to defendants; and thereupon the order in question was drawn up by myself and my brothers Wightman and Erle, and posted up at Chambers. It is not a rule of court, but merely a regulation amongst ourselves, to govern us in the exercise of our discretion in making those orders at Chambers. Here the consent was drawn up by an attorney in the country who may have known nothing of this regulation. If it had been a rule of court, it would have been his duty to have known of it.”



## \*EASTER VACATION.(a)

[\*1020]

PRICKETT against GRATREX. *Saturday, May 9th.*

A justice's warrant, committing a party in default of his finding sureties to keep the peace, is bad if the commitment be for no definite time, but "until he shall find such sureties" or be discharged by due course of law.

An action lies against the justice for committing on such warrant; and bona fides is no defence. It is not necessary that such warrant should fix the amount in which sureties are to be given.

Notice of action, for a commitment under such warrant, stated that the justice had caused the complainant to be unlawfully committed to a certain common jail or prison in the borough of Monmouth and there imprisoned and kept, &c., without reasonable or probable cause, from &c., to &c., (naming the days;) and the notice went on to state that complainant would, at the expiration of one calendar month, cause a writ of summons to be sued out of the Court of Queen's Bench against the justice, at complainant's suit, for the said imprisonment, and proceed against him therefore according to law.

Held a sufficient notice under stat. 24 G. 2, c. 44, s. 1, as to the place where the cause of action arose, the subject of complaint generally, and the intended course of proceeding.

TRESPASS for assaulting plaintiff, and causing him to be apprehended, and unlawfully committed to a certain common jail in the borough of Monmouth in the county of Monmouth, and to be there imprisoned, &c., and detained, &c., without reasonable or probable cause, for a long time, to wit, &c.

Plea, Not guilty.

On the trial before PLATT, B., at the Monmouthshire Spring assizes, 1845, it appeared that the defendant was a justice of the peace for the borough of Monmouth, and that the plaintiff was brought before him on a charge of sending threatening letters. The defendant required the plaintiff to enter into security to keep the peace, in his own recognisance for 50*l.*, and on that of two sureties for 25*l.* each. The plaintiff not having \*done so, the defendant committed him on the following [\*1021] warrant.

\* Borough of Monmouth, to wit. } To the constables of the said borough, and to the keeper of the jail at Monmouth in the said borough. Whereas John Powell, of," &c., "hath this day required sureties of the peace before me, one of her majesty's justices of the peace assigned to keep the peace within the said borough, against James Prickett, of," &c., "labourer, and withal hath taken his corporal oath before me that he requireth the same not from any private malice, hatred, or ill will, but simply that he apprehends that he goes in danger of his life, or that some bodily harm will be done, or caused to be done, unto him the said John Powell by the said James Prickett, in breach of the peace: And whereas the said J. Prickett is now brought before me and required to find sufficient sureties to keep the peace as well towards our said lady the queen

(a) The Court sat in Banc on Saturday the 9th, and Monday the 11th of May

as towards all her liege people, and especially towards the said John Powell: And whereas the said J. Prickett hath refused and doth now refuse before me to find such sureties: These are, therefore, in her majesty's name to command you the said constables to convey the said J. Prickett to the said keeper; and you the said keeper are hereby required to receive and safely keep him in your said jail until he shall find such sureties as aforesaid, or shall be thence discharged by due course of law; and for your so doing this shall be your sufficient warrant. Given," &c., "this 14th day of March, 1843. THO. GRATREX." (L. s.)

The plaintiff remained in jail from March to August, 1843; he then found sureties, and was discharged: and, in December, 1843, he  
 \*1022] served the defendant with notice of action as follows.

"To Thomas Gratrex, Esq., one of her majesty's justices," &c. "Sir, You having, on or about the 14th day of March last, as one of her majesty's justices of the peace in and for the said borough of Monmouth, caused me to be apprehended and unlawfully committed to a certain common jail or prison in the borough of Monmouth aforesaid, and to be there imprisoned, and kept and detained in prison there, without any reasonable or probable cause whatsoever, for a long space of time, to wit from the said 14th day of March last to the 9th day of August then next following: I do, therefore, according to the form of the statute," 24 G. 2, c. 44, s. 1, &c., "hereby give you notice that I shall, at or soon after the expiration of one calendar month," &c., "cause a writ of summons to be sued out of her majesty's Court of Queen's Bench at Westminster against you at my suit for the said imprisonment, and shall proceed against you therefore according to law. Dated, &c. JAMES PRICKETT."

The plaintiff's counsel contended that the warrant was illegal, and the counsel for the defendant that the notice was insufficient, on the grounds afterwards stated in argument. The learned baron directed the jury to find for the defendant if they thought he had acted bona fide. Verdict for defendant.

In Hilary term, 1845, *Godson* obtained a rule to show cause why a verdict should not be entered for the plaintiff, or a new trial had on the ground of misdirection.

\*1023] *Whately* and *Greaves* now showed cause. First, the plaintiff is not entitled to succeed, even if the warrant be bad, unless the court ho'd that the notice of action is good. Now that notice does not state the place where the act complained of was done, the words being only "caused me to be apprehended and unlawfully committed to a certain common jail or prison in the borough of Monmouth." This is insufficient; *Martins v. Upcher*, 3 Q. B. 662; *Breese v. Jerdein*, 4 Q. B. 585; *Jackson v. Fytche*, 14 M. & W. 381, will be cited on the other side. But the first mentioned case contains the more correct view of the effect of

stat. 24, G. 2, c. 44, s. 1. The act complained of is, not the imprisonment in the jail of Monmouth, but the order and warrant of the defendant, which were made elsewhere, and of which the imprisonment in the jail is only a consequence. There might, of course, be an imprisonment on the spot where the magistrate gave the order, as in *Rex v. Birnie*, 5 C. & P. 206: but that is not so here. The issuing of the warrant may be considered the gist of the action, as appears by the language of Lord ELLENBOROUGH in *Rex v. The Justices of Devon*, 1 M. & S. 411, 412, and the forms in Tidd,<sup>(a)</sup> point out that the complaint is the causing to be apprehended. Two magistrates, acting at different places, might commit the same party to the same place upon different charges: but, from an action in this form, neither of them, if sued, could see whether the act charged was that which he had done. By sect. 5, as was pointed out by COLERIDGE, J., in *Martins v. Upcher*, the evidence is \*to be confined to the cause of action contained in the notice. In this notice, [\*1024 that which is complained of is only what was done in the jail.

Secondly, the warrant is good. It is objected that the number of sureties, and the amount in which they are to be bound, are not stated, and that the committal is not for a time certain. In *Foster's Case*, 5 Rep. 59 a, where the warrant was held good, the words were only "venire faciat sufficient' manucapt'," and the party, on refusal to find such bail, was to be taken to the next prison "ibidem moratur' quosque gratis hoc facer' voluer'." In *Willes v. Bridger*, 2 B. & Ald. 278, it was contended that even a binding over for a certain time was bad, and that there was no power to bind except to the next sessions: but the Court held that there was no such restriction. The old forms are framed as generally as in *Foster's Case*; Lambard's *Eirenarcha*, ch. 2, p. 85, ed. 1619; Fitzherb. *L'Office at Auctorite de Justices, &c.*, p. 235 b, ed. 1606; Fitz. Nat. Br. 80 D.; West's *Symboleographie*, sect. 577. It is said that this may cause imprisonment for life; but stat. 34 Ed. 3, c. 1, directs absolutely that sufficient surety be taken. From *Foster's Case* it appears that, where a party was brought before a magistrate and ordered to find security to keep the peace, if he failed to do so, he was imprisoned without a second warrant. A *supplicavit* might be taken out, whereupon a writ issued directed to the justices or sheriff, which was discharged upon the party against whom it issued coming into Chancery and there finding sureties, whereupon a *supersedeas* issued. The writ which issued on the *supplicavit* directed that \*the party should find "sufficient manucaptors," and, if he did not do so, he was to be committed to jail, "to be kept safely [\*1025 in the same, until he will do this freely;" Fitz. Nat. Br. 80 D. Now it is clear that the justices or sheriff could not depart from the exigency of this writ; the party, therefore, if he did not find sureties, would be im-

(a) Tidd's Practical Forms, p. 1, &c. 8th ed.

prisoned for life. On this, Dalton (Justice, 285, ch. 122, ed. 1742) says: "also by this writ of supplicavit, the party (against whom the writ is sued forth) shall be bound to the peace for ever (if he be taken;) for the writ containeth or mentioneth, not that he shall be bound to keep peace until any certain time, but generally." In Bro. Abr. tit. *Peace*, pl. 17, it is said that, if a man be bound to keep the peace indefinitely, he will be under the obligation for all his life; for which Mich. 21, E. 4, fol. 40, B. pl. 4, is cited. In *Mr. Bacon's Case*, 1 Lev. 146; S. C. 1 Sid. 230, a party was ordered to find sureties of good behaviour during life. And Dalton (Justice, 271, c. 117, ed. 1742) says that an insane person may be bound to keep the peace for ever, citing *Beverly's Case*, 4 Rep. 123 b, 124 a, b. In a modern case, *Rex v. Bowes*, 1 T. R. 696, it was held that the court might require security for as long as they should think right. This agrees with Lamb. Eiren. 100, 103, Fitzherb. L'Office, &c., 139 b. Here, the party is bound only till he find sureties; if he were bound for a time certain, he could not be relieved by any other justice. But, even if the warrant were bad, the action would not lie. A justice is not liable for what he does in his character of judge of record; and that this act was done in \*such a character appears from Dalton; \*1026] (Justice, 258, ch. 116, ed. 1742,) who cites Yearb. Hil. 9 H. 6, fol. 60, A. pl. 9; Yearb. Pasch. 9 E. 4, fol. 3, A. pl. 10; Bro. Abr. tit. *Judges, Justices, &c.*, pl. 2, pl. 10; ib. tit. *Faux Imprisonment*, pl. 12; ib. tit. *Peace et Suertie, &c.*, pl. 8; and Yearb. Hill. 14 H. 8, fol. 16 A, pl. 3, is to the same effect. This principle appears to have been admitted by the Court of Exchequer in *Watson v. Bodell*, 14 M. & W. 57, 69. And it leads to no practical grievance, because a party may always bring himself before this Court for relief.

: *Godson*, contra, May 11th. The warrant was bad in itself; and therefore the learned Judge ought not to have left the question of bona fides to the jury. In *Willes v. Bridger*, 2 B. & Ald. 278, where it was contended that a justice could not bind a party to keep the peace for any time but till the next sessions, this court held that he might bind for a different time, but a time certain. It was not contended that the term might be indefinite. In *Rex v. Bowes*, 1 T. R. 696, this court held that the power of binding was not limited to a year, but not that the binding might be unlimited. And the modern practice has been always to mention a time. In *Regina v. Downey*, 7 Q. B. 281, a warrant to apprehend and keep an indicted person "to the end that he may become bound and find sufficient sureties to answer the said indictment, and be further dealt with according to law," was held bad because it did not direct that the party should be brought before any judge or justice, and it therefore had the effect of keeping him indefinitely \*in jail. The dictum in Yearb. Mich. \*1027] 21 Ed. 4, fol. 40, B. pl. 4, cited for the defendant, does not

amount to a ruling that sureties may lawfully be required without limit as to time. The present objection does not appear to have been brought under consideration in *Foster's Case*, 5 Rep. 59 a. The precedent in Lamb. Eiren. 85 is unsupported by modern authorities, and clearly bad; and those in Dalton (Justice, 416, ch. 274, ed. 1742) merely follow Lambard. The same remark applies to the form in West's Symbol. s. 577. In *Bacon's Case*, 1 Lev. 146; S. C. 1 Sid. 230, sureties during life were required; but there the party had been convicted on an indictment. Further, the warrant does not allege any thing to have been done by the now plaintiff. And it ought to have fixed the amount in which the sureties were to be bound. [Lord DENMAN, C. J. That was not stated in *Willes v. Bridger*, 2 B. & Ald. 278; but the objection does not appear to have been taken.] The principle is the same as that which requires that, when justices exercise a discretionary power in imposing penalties, they must ascertain the amount. And, here, the committing justice knows the circumstances of the case and the amount in which recognisance ought to be taken; the justice before whom the party may afterwards be brought may know neither. In *Rex v. Holloway*, 2 Dowl. P. C. 525, where the committing magistrates had required sureties to a certain amount, and a motion was made to reduce it, TAUNTON, J., in the Bail Court, said that the amount of security to be given was in their discretion, and this court could not interfere to control it. A correct form, as to the particulars now in question, is given in 2 Archb. Justice of the Peace, 544, 4th ed. Ancient precedents may be cited for practices which, on examination, have been found indefensible, and have long since been abandoned, as the issuing of general warrants,<sup>(a)</sup> and even the infliction of torture.<sup>(b)</sup> It cannot be maintained that, because the Justice, in committing, acts as judge of a court of record, no action lies against him for committing on a bad warrant. [Lord DENMAN, C. J. If we wish to hear that point argued, we will tell you.] As to the notice of action: the time of the imprisonment is specified; and the place appears, by the words "there imprisoned," to be a common jail in the borough of Monmouth; and it cannot be assumed that there are more jails than one there. The objections, therefore, which prevailed in *Martins v. Upcher*, 3 Q. B. 662, and *Breese v. Jerdein*, 4 Q. B. 585, do not apply to this notice. And, on the objection as to place, *Jackson v. Fytche*, 14 M. & W. 381, is a clear authority for the plaintiff. The form of the intended action is sufficiently specified for the purpose of a notice under the statute. The writ of summons cannot properly be set out when the action is not yet commenced.

(a) *Money v. Leach*, 3 Bur. 1692, 1742; *Entick v. Carrington*, 19 How. St. Tr. 1030. See *Rex v. Watts*, 1 B. & Ad. 166.

(b) Jardine's Reading on the Use of Torture in the Criminal Law of England was cited; also 10 How. St. Tr. 753, note to the proceedings against Spreull and Ferguson.

LORD DENMAN, C. J. The power of justices to prevent breaches of the peace by requiring sureties is a necessary power, but a very great one, and to be kept within proper bounds. On such a subject, we are not  
 •1029] \*accustomed to regard ancient precedents with great respect; and, when we find recent authorities opposed to them, we are inclined to follow these in preference. *Willes v. Bridger*, 2 B. & Ald. 278, is an authority for holding that, in a warrant of this kind, the amount of sureties need not be stated; and it seems reasonable that this should be fixed by the justice before whom the party may afterwards be brought for the purpose of giving the sureties. But there is nothing to remove the objection that the time for which the party stands committed in default of sureties is left indefinite. Without some express limitation in the warrant, a poor man, who is unable to find sureties, may be imprisoned for life. The warrant here gives no limit but the finding of sureties; and this is a fatal defect. A limitation of the time does not necessarily lead to the inconvenience that might be apprehended from the party being discharged at the expiration of it; for sureties might be again required, if the danger of a breach of the peace continued. I am also of opinion that the notice is good. It sufficiently points out the place (the common jail in the borough of Monmouth) where the cause of action arose. The intended form of action need not be specified: the nature of the grievance is clearly shown; and it is evident that the remedy must be by an action for false imprisonment. There is no ground for a distinction between "imprisoned" and "caused to be imprisoned." I do not agree that bona fides in the magistrate can be a justification for imprisoning under a bad warrant; if it were, the action might have received that answer in almost all the cases that have occurred.

•1030] \*PATTESON, J. I had left the court when this case was commenced on Saturday; but, so far as the argument I have now heard enables me, I agree in what has been said by my lord.

WILLIAMS, J. The amount of security required should bear a relation to the quality and quantity of the offence; but the mere threat of a breach of the peace cannot be so enormous as to warrant an imprisonment which might continue for life. The notice is sufficient: *Sabin v. De Burgh*, 2 Camp. 196, shows that the cause of action must be stated, but the form need not.(a)

LORD DENMAN, C. J. As to bona fides, that has been made a test in recent cases, where the question was, whether notice of action was necessary or not.

Rule absolute for a new trial.

(a) No other judge was present.



COOK against M'PHERSON. *Saturday, May 9th.*

(In Error.)

A declaration in debt, in an inferior court (of the borough of I.) alleged that defendant, at I., within the jurisdiction of the Court, was indebted to plaintiff in 10*l.* for money found to be due on an account then stated between them, to be then and there paid on request; with non-payment and a refusal, to wit, at I. aforesaid, within the jurisdiction; to the damage of plaintiff within the jurisdiction. The marginal venue was laid at I.

*Held* bad, after verdict, for not showing that the cause of action arose within the jurisdiction.

ERROR from the Court of Small Pleas, in the town and borough of Ipswich. The declaration below was as follows:

<p>*The town and borough of Ipswich, Suffolk, to wit.</p>	}	<p>*Be it remembered that Donald M'Pherson, by," &amp;c., "his attorney, complains of Samuel [*1031 Cook, who has been summoned," &amp;c., "in an action of debt; and the said D. M'P. demands of the said S. C. the sum of 50<i>l.</i>, which he owes," &amp;c. "For that, whereas the said defendant, on," &amp;c., "at Ipswich, in the county of Suffolk, and within the jurisdiction of this Court, was indebted to the plaintiff in the sum of 10<i>l.</i> for the price and value of goods bargained and sold by the plaintiff to the defendant at his request, and in 10<i>l.</i> for the price and value of goods sold and delivered by the plaintiff to the defendant at his request, and in 10<i>l.</i> for money lent and advanced by the plaintiff to the defendant at his request, and in 10<i>l.</i> for money paid, laid out, and expended by the plaintiff to and for the said defendant at his request, and in 10<i>l.</i> for money found to be due from the defendant to the plaintiff on an account then stated between them; which said several moneys were to be then and there paid respectively by the defendant to the plaintiff on request; whereby, and by reason of the non- payment thereof, an action hath accrued to the plaintiff to demand and have, of and from the defendant, the said several moneys respectively, making together the sum of 50<i>l.</i>, being the said sum above demanded: yet," &amp;c., (non-payment and refusal) "to wit, at Ipswich aforesaid, and within the jurisdiction aforesaid, to the damage of the said plaintiff, within the jurisdiction aforesaid, of 10<i>l.</i>: and therefore he brings suit," &amp;c.</p>
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General demurrer. Joinder.

The court below gave judgment for the plaintiff \*there: upon [\*1032  
which error was brought. Joinder in error.(a)

G. Hayes, for the plaintiff in error. The declaration is bad, for not showing that the substantial cause of action arose within the local jurisdiction. It is indeed averred that the defendant was indebted within the jurisdiction: but that averment would be true wherever the cause of

(a) Besides the objections decided upon in this case, an objection was taken to the entry of the judgment below, on the ground that it contained a venire for a jury to assess damages, followed by a judgment on nil dicit. On this point, however, no decision was given.

action arose: it should be shown that the goods were sold, or the money lent, &c., within the jurisdiction. The authorities are collected in note (1 to *Peacock v. Bell*, 1 Wms. Saund. 74 a, 6th ed.: and an omission in this respect is fatal after verdict; *Trevor v. Wall*, 1 T. R. 151. [*Lush*, for the defendant in error, said that he should rely on the count upon an account stated.] The declaration does not allege that the account was stated within the jurisdiction; the words are "an account *then* stated." This is the consideration for the promise; and it should therefore appear to have been made within the jurisdiction; *Ramsy v. Atkinson*, 1 Lev. 50, *Whitehead v. Brown*, 1 Lev. 96; *Drake v. Beare*, 1 Lev. 104; *Price v. Hill*, 1 Lev. 137. If the word "then" were enough, it would be enough to say "for goods then sold and delivered." Besides, if any one count be bad, the judgment, being general, must be reversed.

*Lush*, contra. The traversable averments must, no doubt, show matter arising within the jurisdiction. But \*here the words describe the  
 \*1033] cause of action as so arising. The action of debt differs from assumpsit in this respect: where a promise will be implied, the averment of a promise is immaterial; but the averment of a debt is material: and the jury here could not have found that the defendant was indebted within the jurisdiction, except upon a cause of action there arising. Further, the declaration here states that the money was to be *there* paid on request. That refers to the venue, which, in an inferior court, and in all cases of local actions, is not immaterial matter, inasmuch as it must be proved. Further, as this question does not arise on special demurrer, the count on the account stated may be supported by the word "then," which refers to the time at which the plaintiff was indebted, a fact averred to have taken place within the jurisdiction. A reasonable intendment will be made; *Chitty v. Luxford*, 3 A. & E. 319:(a) and the courts have often regretted the strictness of the rule. [Lord DENMAN, C. J. Not the rule itself, but its application in particular cases.] The debt respecting which the account is stated need not be shown to have arisen within the jurisdiction; *Emery v. Bartlett*, 2 Ld. Raym. 1555, recognised in *Williams v. Gibbs*, 5 A. & E. 208. And the judgment cannot be reversed in toto, if any one count be good: the case is not like one of general damages found by a jury. The court may reverse as to one count, and affirm as to another; *Everard v. Paterson*, 6 Taun. 625.

Lord DENMAN, C. J. The authorities are clearly against the defendant  
 \*1034] in error. *Chitty v. Luxford*, is \*not a decision the other way: the point was there given up by counsel; had that not been so, I think the judgment would have been very questionable.

PATTESON, J. *Salter v. Slade*, 1 A. & E. 608, perhaps comes a little nearer to this case; but it does not furnish any decision available to the

(a) See *Dunn v. Crump*, 3 Br. & B. 399.

defendant in error. We have nothing on the record but that the defendant below was indebted within the jurisdiction.

WILLIAMS, J., concurred.

Judgment reversed.(a)

(a) Coleridge, J., was absent on account of illness: Wightman, J., was sitting at Nisi Prius.

### WILSON against NIGHTINGALE and Two Others. *Saturday, May 9th.*

Under 1 stat. 2 W. & M. c. 5, s. 2, the notice of distress for rent, to be given five days before sale, must be in writing.

**CASE.** The declaration, so far as material to the point decided in this case, complained, in the second count, of a distress for more rent than was due; in the third count, of the sale of a distress without appraisement according to the statute; in the fourth count, of a sale of the distress "without giving to the plaintiff, or leaving at the chief mansion-house, or other most notorious place on the said premises, any notice of the said distress and of the cause of taking the same, as required by and according to the statute," &c.; in the fifth count, of a sale of the distress before the expiration of five days next after the taking of the goods and giving of notice.

\*One of the defendants suffered judgment by default. The other two pleaded: [\*1035

1. To the first, second, fourth and last counts, Not Guilty (by statute: 11 G. 2 c. 19, s. 21.)

2. To the first count; a traverse of fact; on which issue was joined.

3. To the third count, payment into Court of 2*l*. Replication: Damages ultra. Issue thereon.

On the trial, before COLTMAN, J., at the Yorkshire Spring assizes, 1845, it appeared that the plaintiff was tenant to the defendant Nightingale of certain premises; that the goods had been distrained for rent; that no written notice of distress had been given or left, but that the plaintiff had received oral notice. The counsel for the plaintiff contended that this was insufficient, 1 stat. 2 W. & M. c. 5, s. 2, enacting that goods distrained for rent may be sold, but only where "the tenant or owner of the goods so distrained shall not, within five days next after such distress taken, and notice thereof (with the causes of such taking) left at the chief mansion-house, or other most notorious place on the premises charged with the rent distrained for, replevy the same." The learned judge overruled the objection; and a verdict was found for the defendants on all the issues except so much as of the first as related to the second count, and on that a verdict for the plaintiff with a farthing damages.

**1035 WILSON v. NIGHTINGALE and Others. E. V. 1846.**

In Easter term, 1845, *Pashley* obtained a rule nisi for a new trial on the ground of misdirection in the ruling above mentioned.(a)

\*1036] \**Dundas* now showed cause. No notice in writing was necessary. The statute simply directs that "notice" shall be left. Here actual receipt of notice was shown.

*Pashley*, contra. The words used in the statute, "notice thereof (with the causes of such taking) left," can be satisfied only by a written notice. An oral notice cannot be said to be left. *Walter v. Rumbal*, 1 Ld. Raym. 53, may appear to be in favour of the defendants; but it does not appear from the report of that case that the notice was not written: at any rate the point was not discussed; for the question raised was, whether it was sufficient to prove that the notice was given to the plaintiff himself, or whether it ought not to be shown that the notice was left at the chief mansion-house or some other notorious place on the premises. [PATTERSON, J. The goods seized belonged, not to the tenant of the land, but \*1037] \*to a third person: (b) and a question arose whether notice to him was enough, without notice to the tenant of the land.] Leaving the notice at the chief mansion, in such a case, would in fact not be giving notice to the owner at all. [Lord DENMAN, C. J. The notice there, as the jury found, was given "according to the statute;" it probably was in writing.] The statute seems to have provided that, if the party be not at the mansion or notorious place, it shall be enough to leave the notice: that clearly shows that a written notice was intended.

Lord DENMAN, C. J. The object of the legislature seems to have been to prevent the matter from being left to parol evidence.

PATTERSON and WILLIAMS, Js.,(c) concurred.

Rule absolute.

(a) It was also objected, that it did not appear, on the evidence, that five clear days had elapsed between the notice and the sale; and the rule mentioned in the text was obtained on misdirection as to this point also. But on this the court pronounced no judgment. Reference was made to *Harper v. Taswell*, 6 C. & P. 166.

The rule was also obtained on the ground that Coltman, J., had misdirected the Jury on the third issue. As to this, the learned judge said that the measure of damages was the difference between the sum actually produced by the sale, and the amount which would have been realized at such sale if the appraisement had been regularly made. *Knotts v. Curtis*, 5 C. & P. 322, and *Crowder v. Self*, 2 M. & Rob. 190, were mentioned. But on this point no decision was pronounced in banc.

The reporters are informed by the counsel engaged on the second trial, at the Yorkshire Summer assizes 1846, before Wightman, J., that the learned judge stated that he should rule in conformity with the ruling of Parke, B., in *Knotts v. Curtis*, namely, that the measure of damages was the difference between the fair value of the goods to the tenant and the amount of rent discharged by the produce of the sale. Ultimately, by consent, a verdict was given for the plaintiff upon all the issues, except so much of the first as related to the first count, and for the defendants on that. Damages 10%. Baines and Pashley for the plaintiff; Knowles and Hugh Hill, for the defendants.

(b) See the special verdict, *Walter v. Rumbal*, 4 Mod. 385.

(c) See p. 1034, note (b)

**DOE on the demise of BOWLEY and Others against BARNES. *Monday, May 11th.***

In ejectment under stat. 59 G. 3, c. 12, s. 17, for a parish house on the demise of A. and B., stated in the declaration to be the churchwardens and overseers of a parish, the fact that they acted as churchwardens and overseers at the time of the alleged demise, is sufficient *prima facie* proof, for the purposes of the action, that they held the offices at that time.

EJECTMENT, on the demise (October 28th, 1844) of "William Bowley, George Hopkins, Robert Payne, and John Brex, churchwardens and overseers of the poor of the parish of Nether Broughton, in the county of Leicester," for a messuage, &c., situate in the said parish and county. On the trial, before MAULE, J., at \*the Leicester Spring assizes, 1845, [•1038 it appeared that the premises in question were claimed by the lessors of the plaintiff, under stat. 59 G. 3, c. 12, s. 17, as overseers of Nether Broughton. Evidence was given to show that the premises were held of the parish; and a parishioner, examined on behalf of the plaintiff, said: "Last October, the churchwardens and overseers were the persons named as lessors of the plaintiff." The defendant's counsel objected that their appointment ought to have been proved, and that it was not enough, for the purpose of this cause, to show that they were acting as churchwardens or overseers at the time of the demise. No further evidence was given on this point. The learned judge gave leave to move for a nonsuit; and the plaintiff had a verdict. *Humfrey*, in Easter term, 1845, moved according to the leave reserved. He cited 1 Phill. Ev. 469, (a) where it is stated, as a rule, "that all public officers, who are proved to have acted as such, are presumed to have been duly appointed to the office, until the contrary is shown;" but, in note (3) doubts are said to have been entertained "whether the rule prevails, where an ejectment is brought in the name of the parish officers."

\**Whitehurst* and *Flowers* now showed cause. The general [•1039 rule is "that in the case of all peace-officers, justices of the peace, constables, &c., it" is "sufficient to prove that they acted in those characters without producing their appointments, and that even in the case of murder;" *Berryman v. Wise*, 4 T. R. 366, and *The Gordons' Case*, (b) there

(a) 8th ed.; p. 450 in the 9th ed.; citing *McGahey v. Alston*, 2 M. & W. 206, 211. The latter part of the note in ed. 8, (omitted in p. 450 of the 9th ed.) is as follows. "The action was brought in the name of the public officer, but he was only a nominal party. It was said, generally, that it was quite immaterial that the action was brought in the name of the officer; but the reason assigned, that such proof was allowed in actions against justices and constables, is not a good one, because the doctrine of admission applies. Doubts have been entertained whether the rule prevails, where an ejectment is brought in the name of the parish officers. Cases of this description rest in some measure upon the presumption, that a party had not committed an unlawful act."

(b) 1 *Leach's Cro. Ca.* 515, 518, note (a). *Whitehurst* also cited *Doe dem. Vevers v. Ault*, B. R. Trinity term, (June 2d,) 1845; not reported. The question on which the decision there turned (on motion for a nonsuit) appears to have been, whether the party executing a certain

cited. And in *Butler v. Ford*, 1 Cro. & M. 662; S. C. 3 Tyr. 677, Lord LYNDEMURST, C. B., said, as to the question whether the defendants had proved themselves to be constables and watchmen under a local act: "I think it was sufficient to prove that they acted in those characters. Evidence of this nature is evidence that they were duly appointed; it is not conclusive, but quite sufficient as a *prima facie* case:" and BAYLEY, B., expressed the same opinion. The rule was also recognised, as to the office of assistant overseer, in *Cannell v. Curtis*, 2 New Ca. 228, 233. And, in *M'Gahey v. Alston*, 2 M. & W. 206, where the plaintiff sued, as vestry clerk, on a bond given to the directors of the poor, his acting as vestry clerk was held sufficient proof that he was so, though the defendant pleaded "that  
 \*1040] the plaintiff was not vestry clerk of 'the parish.'" There the point was expressly taken, that the plaintiff's right to sue upon the bond depended on his being vestry clerk, and that, unless he was legally placed in that office, the action must fail. But the court overruled the objection; and PARKE, B., said: "The plaintiff is a public parochial officer; and the rule is, that all public officers who are proved to have acted as such, are presumed to have been duly appointed to the office, until the contrary is shown." Unless, therefore, a distinction can be drawn between actions to recover real and actions to recover personal property, this case is a direct authority for the plaintiff.

*Humfrey*, contra. The argument for the plaintiff goes beyond any case hitherto decided, the attempt being to establish that, where a party's claim to real property, which is under litigation, depends upon his holding a particular office, he may give himself title by assuming to act in that office. Even as to personal property, no decision to this precise effect has been cited. In *Berryman v. Wise*, 4 T. R. 366, (a) the defendant himself had described the plaintiff as an attorney by the libel in question. In *Butler v. Ford*, the question was only whether the defendants were entitled to notice of suit under a paving, lighting, and watching act which gave that protection to "any person or persons" sued "for any thing done or to be done, under or by virtue of that act." Whether the thing done was or was not of that description was a very different question from that of title to property. *Cannell v.*

*Curtis*, 2 New C. 228, was a case of libel, in which the  
 \*1041] libel itself pointed to the plaintiff's official character; and PARKE, B.,

demise was proved, otherwise than by hearsay, to be the sole survivor of a body of trustees empowered to make such devises. It was found, on reading the judge's note, that there was such evidence, other than hearsay. The case was tried before Tindal, C. J., at the Derby Spring assizes, 1844; cause was shown against the rule for a nonsuit by Whitehurst, and the rule supported (but abandoned on the reading of the note) by G. Hayes, before Lord Denman, C. J., Patteson, Williams, and Coleridge, J. Whitehurst also cited, in his argument reported in the text, a dictum of Parke, B., in a case at Lincoln, (not named,) as to commissioners of inclosure.

-(a) See *Alfred v. Farlow*, ante, pp. 854, 859, note (b).



referring to the case in *M'Gahey v. Alston*, 2 M. & W. 209, seems to ground the decision on that circumstance. He says afterwards that, "in all actions *against* justices and constables, no more is requisite than proof of their acting in those characters:" but that cannot be taken as extending to all actions *by* these or other officers. In *M'Gahey v. Alston*, 2 M. & W. 206, the plea answered by the evidence of acting was only "that the plaintiff was not vestry clerk." In *Cannell v. Curtis*, 2 New Ca. 228, the plea alleged that "the plaintiff had not been appointed, and was not assistant overseer;" and TINDAL, C. J., held that the evidence of acting was sufficient to prove the legality of an appointment which had been signed by the magistrates; but he seems to have been of opinion that, if the plaintiff's election had been denied, a due election must have been proved. If, therefore, the present plaintiffs had been endeavouring to recover even personal property in an action of contract, their election to be churchwardens and overseers might have been put in issue, and evidence of it must then have been given: and whatever might be put in issue in an action of contract must, in an action of ejectment, be proved, though not expressly questioned by plea. Churchwardens and overseers, suing in respect of parish lands, have no right of action, except in virtue of their parliamentary title, and cannot recover in their official character without showing it in their declaration; *Ward v. Clarke*, 12 M. & W. 747; they must, in like manner, be bound to give strict proof of it at nisi prius; especially when they \*proceed against a person not holding under them, but being a stranger. [PATTESON, J. In *Doe* [\*1042 *dem. James v. Brawn*, 5 B. & Ald. 243, the sheriff took a lease in execution; and the under sheriff, in his name, assigned the leasehold premises by deed to the lessor of the plaintiff. There was no evidence of an appointment empowering the under sheriff to execute deeds in the sheriff's name; but ABBOTT, C. J., thought that the acting as under sheriff was sufficient evidence of an appointment, and that the under sheriff must be presumed to have had authority to execute all instruments necessary to be executed by the sheriff; and, on motion for a nonsuit, after verdict for the plaintiff, the Court upheld that ruling. The present case would have been exactly the same, if the churchwardens and overseers had leased to A., and A. had been lessor of the plaintiff.] Nothing was in question there, but the mere fact of an assignment, which the evidence sufficiently proved. [PATTESON, J. The point was, that the act of a person assigning as an officer was sufficient as against a third party.] No case decides that a person shall entitle himself simply by his own act, in an action of trespass to goods or land.

LORD DENMAN, C. J. I cannot distinguish the present case from that of the under sheriff's assignee, or of a party taking a lease from the parish officers, and becoming plaintiff in an ejectment. In the case just referred

to, the acting of the under sheriff in executing the deed was held to prove title ; and so, I think, does the acting of the parish officers here. The authorities cited in 1 Phillpotts on Evidence, 432, 9th ed., place the rule \*on a ground much beyond the supposed doctrine of admissions ; \*1042] and the criminal cases on the subject are particularly strong.

PATTESON, J. It is a recognised principle, that a person acting in the capacity of a public officer is *prima facie*, taken to be so. The fact does not of itself, prove any title ; but only that the person fills the office. No distinction has been shown, as to this point, between ejectment and other actions. In a case before my brother PARKER, referred to at the bar,(a) he only expressed an opinion.

WILLIAMS, J. The distinction between cases, such as *Radford v. McIntosh*, 3 T. R. 632, where the exercise of office by a plaintiff has been recognised by the defendant, and those in which it is sought to prove a person's official character by the mere act of the person himself, might, if available, have been urged in *Doe dem. James v. Brown*, 5 B. & Ald. 243 : but Mr. *Humfrey* has not shown that any such legal distinction exists. There the act of the under sheriff in executing the assignment was taken to be evidence that he had official authority to do so. Whether it maintained the plaintiff's action in any other respect, was a different question : the only point decided was, that it established the act of assignment.(b)

Rule discharged.

(a) See p. 1039, note (b), *ante*.

(b) Only three judges were present.

END OF EASTER VACATION.

\*The following case was, by inadvertence, not reported in its proper place. [\*1044]

### COOK against PEARCE and Another.

*Held*, by the Court of Queen's Bench, that the title of a patent must (though not as minutely as the specification) describe the nature of the invention; and that the patent is void if the title is so generally worded as to be capable of comprising not only the particular invention, but improvements not contemplated in it.

As where the patent was taken out "for Improvements in carriages," and the invention was, in fact, an improvement in German shutters, which were used only in some kinds of carriages.

*Held* by the Court of Exchequer Chamber, reversing the above judgment that, where the title is not inconsistent with the specification, and no fraud is practised on the Crown or the subject, it is not a fatal objection that the title is so general as to be capable of comprising a different invention from that for which the patent is claimed: That the title "for Improvements in carriages" might be taken to mean improvements in some kinds of carriages, and did not necessarily imply any untrue assertion, though, in fact, the improvements were not applicable to all carriages: and that the patent was valid.

By the same Court: Where a plea offers an insufficient defence, and is traversed, and a special verdict is found, affirming the allegations of the plea, and referring to the Court whether the issue should be found for the plaintiff or defendant, the Court will direct a verdict for the plaintiff non obstante veredicto, and not a verdict for the plaintiff on the issue.

**CASE.** The declaration stated that plaintiff, at the time of the making, &c., of the letters patent, and of the committing of the grievances, after mentioned, was the true inventor of "certain improvements in carriages;" and thereupon the Queen, by letters patent, reciting that the plaintiff had, by petition to her majesty, represented "that he had invented improvements in carriages," and was the first and true inventor thereof, &c., and had therefore prayed her majesty's letters patent, &c., gave and granted to plaintiff license, &c., to make, use, exercise, and vend his said invention within, &c., with a proviso avoiding the patent if plaintiff should not particularly describe the nature of the invention, &c., by an instrument in writing, &c., and cause the same to be enrolled, &c., within six calendar months. Averment that plaintiff did particularly describe, &c., and enrol, &c.: Yet defendants, well knowing, &c., within the term mentioned in the letters patent, to wit, on, &c., without plaintiff's leave, and against his will made and sold a carriage with a shutter and apparatus, and divers, to wit, ten carriage heads \*with shutters and certain apparatus, &c., and then used and applied the same, in imitation and resemblance of [\*1045] plaintiff's said invention, &c.; in breach of the said letters patent, &c.: whereby, &c.

The defendants pleaded several pleas,(a) of which the following only is material to this report:

(a) 1. Not Guilty. 2. Plaintiff not the true and first inventor. 3. That the supposed invention was not, at the time of making the patent, a new invention, &c. 4. That plaintiff did not, by an instrument in writing, &c., describe the nature of his invention. 5. That the alleged invention was not an improvement in carriages, nor of any public benefit, &c. Replikation, joining issue on pleas 1, 2, and 4. To plea 3, that the invention was new, &c. Issue thereon. To plea 5, that the invention was an improvement in carriages, and of public benefit, &c. Issue thereon.

Plea 6. That the instrument in writing in the declaration mentioned, and whereby plaintiff has alleged that he did particularly describe the nature of his said alleged invention, was and is in the words and figures following, viz. The plea then set out the specification, which, after reciting that the queen, by her letters patent, had given plaintiff license, &c., that he, his executors, &c., and no others should make, use, &c., his invention of "Improvements in carriages," proceeded: "My invention relates to that description of carriages wherein what are called German shutters, are used to close them; and the invention consists of a mode of constructing and applying certain apparatus to such carriages and German shutters to facilitate the working and moving of such shutters." The specification then went into a more particular description, explanatory of drawings which were annexed, and concluded as follows: "And I would have it understood that what I claim as the invention secured under the present letters patent, is the mode of combining the parts as herein described, and applying them to carriages for facilitating the moving  
 \*or working of German shutters by springs." The plea then  
 \*1046] continued: "And the defendants further say that, although the said alleged invention in the declaration and letters patent respectively mentioned, is therein styled and described as 'improvements in carriages,' yet the said invention in truth and in fact is not an invention of improvements in carriages generally, but of certain alleged improvements in the fixing and adapting German shutters in those carriages only in which German shutters are used; and that German shutters cannot be used in divers and very many carriages, to wit, coaches, chariots, and other covered carriages of the like kind: And so the defendants say that the title of the said invention is too large and general, and by reason thereof the said letters patent are void and of no force." Verification.

Replication. "That the said invention was and is an invention of improvements in carriages, in manner and form above in that behalf alleged." Conclusion to the county. Issue thereon.

On the trial, before WIGHTMAN, J., at the sittings in Middlesex after Michaelmas term, 1841, the jury found, on the first issue, a verdict of Guilty; and, on the other issues a special verdict, which, as to the 2d, 3d, 4th, and 5th issues, was substantially for the plaintiff.<sup>(a)</sup> As to the 6th issue, the verdict was as follows:

(a) The verdict on these (after the finding of Guilty on the 1st issue) was: "And as to the said issue 2dly above joined between the said parties, the jurors aforesaid upon their oath aforesaid say: 'That the use of German shutters to carriages, folded in three folds in the manner described in the specification, as far as the folding was concerned, was public and common before the date of the patent, but that the plaintiff was the true and first inventor of the mode of combining the parts as described in the specification, and applying them to carriages for facilitating the moving or working of German shutters by springs, in manner and form as the plaintiff hath above in that behalf alleged. And, as to the issues 3dly, 4thly, and 5thly above joined between the said parties, the jurors,' &c., "say: That the use of German shutters to

\*“The jurors,” &c., “say: That the said invention in the declaration and letters patent respectively mentioned, is not an [1047 invention of improvements in carriages generally, but of certain improvements in the fixing and adapting German shutters in those carriages only in which German shutters are used, and that German shutters cannot be used in divers and very many carriages, to wit, coaches, chariots, and other covered carriages of the like kind. But whether or not, upon the whole matter aforesaid,” &c., “the said invention in the said declaration mentioned was and is an invention of improvements in carriages in manner and form as alleged in the said issue 6thly above joined between the parties,” &c., “they the said jurors are altogether ignorant,” &c. “And, if, upon the whole matter,” &c.: the usual conclusion, finding, alternatively, according to the opinion of the court on each point.

The special verdict was argued in the Court of \*Queen’s Bench, [1048 in Hilary term (November 18th) 1842,(a) by Sir *F. Pollock*, attorney-general, for the plaintiff, and *Erle* for the defendants. The arguments will be sufficiently collected from the judgment of the court, and from the arguments by the same counsel, in the Exchequer Chamber, post, pp. 1055, &c. *Cur. adv. vult.*

DENMAN, C. J., in Hilary vacation (February 2d) 1843, delivered the judgment of the court. .

This is an action for the infringement of a patent, and that patent is in the declaration averred, and in the specification described, to have been obtained for an invention of “improvements in carriages.” (His lordship then stated the pleadings and verdict, and proceeded as follows:)

It appears, therefore, that in this case there is no objection to the sufficiency of the specification, the special verdict finding that it describes the invention with sufficient certainty and precision, and also that the said invention is of public utility. The objection here is to the vagueness and generality of the title of the patent, or, in other words, of the description of *the thing* for which the patent has been obtained. And certainly there is nothing to disclose or even to point at the particular improvement for which, as we learn from the specification, the patent was really obtained. The words “improvements in carriages” may mean improve-

carriages folded in three folds, in the manner described in the specification, as far as the folding is concerned, was public and common before the date of the patent, but that, except as to such folding, the said invention in the said letters patent was, at the time of the making of the said letters patent, a new invention as to the public use and exercise thereof, in manner and form as the plaintiff hath within in that behalf alleged: And that the plaintiff did, by an instrument in writing under his hand and seal, particularly describe the nature of his said invention, and in what manner the same was to be performed, so as to enable a workman of ordinary skill to carry the invention into effect and apply it to all carriages to which it is applicable: And that the said invention is an improvement to all those carriages to which it is applicable, and is of public benefit and advantage; but there are several descriptions of carriages to which it is not applicable, such as coaches and chariots. And, as to the issue 6thly,” &c.

(a) Before Lord Denman, C. J., Williams, Coleridge, and Wightman, Js

ments in the whole structure, or in the body, or the wheels, or the springs, or any other part; patents having in fact been obtained for the improvement of detached parts. There is nothing to show that “the fixing and  
 \*1049] “adapting of German shutters” (or in whatever language the invention ought to be described) was meant, rather than some improvement to some of the parts of a carriage before enumerated. It is little less general, if at all, than would be a patent obtained for “improvements in manufactures,” the invention really being a new machine for improving the spinning of cotton.

And the question is, whether this vagueness and uncertainty does or does not vitiate the patent. Now, in the case of *Lord Cochrane v. Smethurst*, 1 Stark. N. P. C. 205, the patent was taken out for “an improved method of lighting cities, towns, and villages,” thus leaving the precise method by which the improvement was to be effected in perfect obscurity. It might have been by flambeaux—it might have been by candles—it might also have been (and, if our experience and knowledge were in such a case admissible, it much more probably was) by some new species of lamp, or some improvement upon an old one. The learned judge who tried that case was of opinion that the patent could not be sustained, and founded that opinion upon its too great generality. “The plaintiff” (as LE BLANC, J., is reported to have expressed himself) “has obtained his patent not for an improved street lamp, but for an improved method of lighting cities, towns, and villages; but from the specification it appears, that the invention consists in the improvement of an old street lamp, by a new combination of parts known before. The patent, therefore, is too general in its terms; it should have been obtained for an improved street-lamp, and not for an improved mode of lighting cities, towns, and villages.”

\*1050] The principle of *Lord Cochrane v. Smethurst*, is of great importance, because it secures to the public the benefit of the discovery for which the patent is taken out. If it were enough to state some improvement in a particular subject in the title of the letters patent, and the patentee were at liberty in his specification to obtain a monopoly in the use of any thing falling under that general description, he might employ the whole six months in making a discovery unknown to him when he obtained the patent. His title might even deprive a person, who should within the six months have made an original invention, of the right to use his own invention, although the patentee had not actually made it, and took out his patent without even suspecting that it could be made, and merely on a general speculation that he or some other person might possibly put in some improvement.

We are unable to distinguish that case from the present, or to discover any reason why, if the patent in that case was vitiated by being “too



general in its terms," this patent can be sustained, there being the same generality and want of description or even allusion to that improvement in German shutters (in common use before) which, as we learn from the specification, was really the invention for which the patent was obtained. It is true that the case referred to is a *Nisi Prius* decision; but it has been quoted before the argument in the present case, and, so far as we are aware, without its authority having been questioned: and it was observable that the learned counsel for the plaintiff did not take that course, but relied upon an alleged distinction between the two cases for the purpose of getting rid of its effect.

From this, therefore, it would seem to follow that "there is, to a certain extent, a resemblance between the title and the specification of a patent, in this, that the former must, though not with the same degree of particularity and minuteness of detail, describe the nature of the invention for which such patent is obtained. We find, in the case of *Bovill v. Moors*, 2 Marsh, 211,(a) the following distinction pointed out. Where a person obtains a patent for a machine, consisting of an entirely new combination of parts, though all the parts may have been used separately in former machines, the specification is correct in setting out the whole as the invention of the patentee: but if a combination of a certain number of those parts have previously existed, up to a certain point, in former machines, the patentee merely adding other combinations, the specification in such case should only state such improvements; though the effect produced be different throughout. The above abstract gives in the main a fair representation of the import of the case, and more especially of what fell from the chief justice: the facts, however, were as follows;—The patent was "for a *machine* for the manufacture of bobbin lace, or twist net," &c. A part of the machine existed before, the patentee having by a new contrivance made an improvement or addition thereto. The objection made at the trial was that "the specification ought to have pointed out *that only*, and the patent ought to have been for an *improvement only*; whereas the specification stated, and the *patentee claimed*, the whole machine as his invention. The patent was held to be void. It is true that the chief justice, at the conclusion of it, seems to make his judgment depend upon the specification "containing more than the patentee had invented. But in the earlier part he thus states the question: "In order to try whether it be, or be not, a new machine throughout, we must consider what *the patent* purposes" (purports) "to give to the patentee, and what privileges he would possess under the patent." He then proceeds to show that *the patent* gives more than he is entitled to, or in other words, is too large and general; the very objection stated by LE BLANC, J., in the case above referred to. And,

(a) See p. 212.

with deference, that does seem to be the true objection ; because the specification may have been (for any thing that appears in that case, was) wholly unobjectionable as to an invention thereby described, but not the invention for which the patent was obtained, which claimed too much. The *specification* was not the less intelligible because a part of it described what had been in use before. The fault was in the patent. The other two judges put the case expressly upon this ground ; Mr. Justice DALLAS comparing it to the case of a patent taken out for the improvement of a *watch*, the improvement being of a *part* only, and Mr. Justice PARK quoting as in point, *Rex v. Else*, Bull. N. P. 76 ; 11 East, 109, note (a), wherein, as he states, “Mr. Justice BULLER held that the patent must not be more extensive than the invention ; and therefore that, if the invention consisted of an addition or improvement only, a patent for the whole machine was void.” Mr. Justice PARK refers to Buller’s *Nisi Prius*, p. 76 : and there the passage just quoted is to be found ; and the authorities in support of it are thus given : “Per Lord MANSFIELD in different cases, and by BULLER, J., in *The King v. Else*, sittings at Westminster after M. 1785.”

\*1053]     \*The particulars of the latter case are given in a note to *Harmar v. Playne*, 11 East, 101, 109, note (c). The patent was for a new invented manufacture of French lace, otherwise ground lace. The specification went generally to the invention of mixing silk and cotton thread upon the frame. For the prosecution it was shown that, prior to the patent, silk and cotton thread had been used together and intermixed upon the same frame. Per BULLER, J. “The patent claims the exclusive liberty of making lace composed of silk and cotton thread mixed ; not of any particular mode of mixing it : and therefore, as it has been clearly proved and admitted that silk and cotton thread were before mixed on the same frame for lace in some mode or other, the patent is clearly void.”

In the case of *Hill v. Thompson*, 3 Meriv. 622, 629, we find the law thus laid down by Lord ELDON : “If there be a patent both for a machine, and for an improvement in the use of it, and it cannot be supported for the machine, although it might for the improvement merely, it is good for nothing altogether, on account of its attempting to cover too much.”

Lastly, upon the subject of the title, what its form ought to be, and for what the patent should appear to be taken out, the substance of the decision in *Jessop’s Case*, cited 2 H. Bl. 476, 489, (to which it is presumed DALLAS, J., referred, without naming it, as has been above mentioned) is thus given by Mr. Justice BULLER in his judgment in the case of *Boulton v. Bull*, 2 H. Bl. 463, 489. “In *Jessop’s Case*, as quoted by my brother ADAIR, the patent was held to be void, because it extended to the *whole* watch, and the invention was of a *particular* movement only.”

\*We think, therefore, that, in conformity to these principles, and in the absence of any countervailing authority, the finding of the jury upon the sixth issue is in effect a finding for the defendants, and that, upon that issue, there must be judgment for them accordingly. [\*1054]

Judgment for defendants.

## IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

COOK against PEARCE and Another.

For marginal note, see p. 1044, ante.

JUDGMENT being entered for the defendants on the 6th issue, and for the plaintiff on the rest, the plaintiff brought error in the Exchequer Chamber. The errors specially assigned were: That the 6th plea is not sufficient in law to bar the plaintiff, &c., and therefore judgment thereon ought to be given for him notwithstanding the verdict, &c. That, upon and by the verdict, &c., found, &c., in manner and form aforesaid as to the 6th issue, the said invention was and is by the law of the land an invention of improvements in carriages in manner and form in that behalf by the plaintiff alleged, and therefore the judgment upon the whole record as to the 6th issue so joined, &c., should be given for the plaintiff upon and as to the said 6th issue. And that, upon the matters found by the jurors aforesaid, "they, the jurors aforesaid, by the law of the land do say that the said invention was and is an invention of improvements in carriages in manner and form in the letters patent and by the plaintiff in that behalf \*mentioned: and that the verdict and finding of the said jurors on the said 6th issue should be given and entered for [\*1055] the said plaintiff William Cook in form following, that is to say, that the said invention was and is an invention of improvements in carriages, in manner and form in that behalf by the plaintiff above alleged."

Joinder in error.

The writ of error was argued in the Exchequer Chamber in Michaelmas vacation (November 27th) 1843.(a)

Sir *F. Pollock*, attorney-general for the plaintiff. The real question is, whether a patent is void which professes to be for improvements in a class of things bearing a common name, if it be not an improvement in every thing of that name. But the title need not show what particular class the patent is applied to, if it is fairly applicable to one. The strict-

(a) Before Tindal, C. J., Coltman, Erskine, and Maule, J., and Parke, Alderson, Gurney and Rolfe, B.

ness contended for on the other side would repeal a large proportion of the patents which have been granted.<sup>(a)</sup> And there is no ground given for it by the Statute of Monopolies, 21 Ja. 1, c. 3. No one is misled by such a title as this. If, indeed, it were taken for the purpose of fraud, there would be a specific ground of objection, that the crown was deceived in the grant. The title here, so far as it denotes the improvement itself, is precise enough. In *\*Sturz v. De La Rue*, 5 Russ. 322, the

**\*1056]** patent purported to be “for certain improvements in copper and other plate printing;” and the invention appeared by the specification to consist in an improved mode of glazing the paper, a particular method of polishing the surface, and the use of a cast iron press-board. It was objected that the title did not agree with the specification, or describe the invention truly. Lord LYNTHURST, C., said: “The description in the patent must unquestionably give some idea, and, so far as it goes, a true idea of the alleged invention, though the specification may be brought in aid to explain it. The title in this patent is for ‘certain improvements in copper and other plate printing.’ Copper-plate printing consists of processes involving a great variety of circumstances:” (his lordship then enumerated them.) “An improvement in any one of those circumstances” “may truly be called an improvement in copper-plate printing.” The invention there was not applicable to large prints.<sup>(b)</sup> In *Fisher v. Dewick*,<sup>(c)</sup> tried before COLTMAN, J., the patent was for improvements in machinery for making bobbin net lace. Sir J. Campbell, for the defendant, objected that the title misdescribed the subject matter, the invention being only for making a spot during a particular part of the process, and being useless where that addition was not wanted; and he said the title should have been “for a mode of making spots in bobbin net lace.” But the

**\*1057]** learned judge said: “Is the invention applicable to any thing but the making of bobbin net lace, and is not it an improvement?” and he overruled the objection: and on motion for a new trial the Court of Common Pleas refused to grant a rule nisi, on account of this ruling. TINDAL, C. J., observing that it could not, without great refinement, be said that the invention was not an improvement in the manufacture of bobbin net lace. In the argument of *Sturz v. De La Rue*, *Lord Cochrane v. Smethurst*, 1 Stark. N. P. C. 205; S. C. Godson on Patents, 104, note (h), and *Rex v. Wheeler*, 2 B & Ald. 345, were cited as

(a) The attorney-general here read the titles of a great number of patents (which he said he had had compared with the enrolments, from a work by A. Pritchard, published in 1841, purporting to give a list of the patents obtained down to the end of 1840. In the argument in B. R., he mentioned *Saunders v. Aston*, 3 B. & Ad. 881, as a case where the objection, as represented by him, might have been taken, if deemed available.

(b) See p. 1060, post.

(c) Not reported on this point. Reported as to notice of objection, 4 New Ca. 706. The statements above are those made in the present argument by Sir F. Pollock, who mentioned that he and Sir T. Wilde were counsel for the plaintiff.

showing that the patent was void. But in *Lord Cochrane v. Smethurst*, the objection applied to the patent itself. LE BLANC, J., said, Godson on Patents, 105, note (h), "Under the general terms of the patent, must it not be taken with reference to the specification; and if the specification is too large, is not the patent so too?" He observed also: "It is in substance a patent for an improvement in street lamps, and should have been so taken." But that title, according to the objection now made, would have been bad. [ALDERSON, B. It was a material objection in that case that the specification comprehended much more than the patent purported to be taken for, and extended even to the lighting of churches and theatres." In *Rex v. Wheeler*, 2 B. & Ald. 345, a patent, stated to be for "a new or improved method of drying and preparing malt," was held to be insufficiently entitled; but that was because the patentee had not by the specification "shown himself to be the inventor of any method of drying or preparing" malt. BULLER, J. in *Boulton v. Bull*, 2 H. Bl. 489, stated it as the generally received opinion, "since the decision in *Morris v. Branson*, (a) "that a patent for an addition is good." "But \*1058] then," he added, "it must be for the addition only, and not for the old machine too. In *Jessop's Case*, cited 2 H. Bl. 476, 489, "the patent was held to be void, because it extended to the whole watch, and the invention was of a particular movement only." But it does not appear from the language in which that case is mentioned that the fault was in nothing but the title. [ALDERSON, B. The patent and specification together may have raised a claim as to the whole watch. The allusion to the case by DALLAS, J., in *Bovill v. Moore*, 2 Marsh. 211, 214, seems to agree with this view of the subject.] If the patent be for an improvement in making watches, and the specification describes, not only the movement in which the invention consists, but other parts of the watch, the patent must fail; but that is not the present case. That case would have resembled this if the patent had been for an improvement in watches, and the specification has shown that the invention consisted in an improvement applicable to some kind of watches but not to all. GROSE, J., says, in *Hornblower v. Boulton*, 8 T. R. 95, 102, "I consider the patent and specification so connected together as to make a part of each other; and to learn what the patent is, I may read the specification and consider it as incorporated in the patent." [GURNEY, B. The objection here is that, on reference to the specification, the improvement appears to be in a part which is essential to some carriages only, not to all.] Perhaps no part of a carriage can be mentioned which is common to all. Even wheels are \*useless to sledges. The only safe rule is, that the title is good [\*1059] if the patentee fairly calls attention by it to the class of objects to which his improvement applies, and shows no intention to mislead,

(a) In 1776; cited in *Boulton v. Bull*, 2 H. Bl. 489.

the existence of which intention is a question for the jury. The 6th plea here should have alleged a design to mislead.

*Erle*, contra. The title itself ought to contain a sufficient description, independently of the specification, which may not be enrolled for six months after the patent is granted. [Sir *F. Pollock*, attorney-general. A patent is never granted now without a skeleton specification.] Any vagueness as to the subject matter is a great practical evil. It often happens that several persons at the same time are on the point of accomplishing an invention; and this generality in the title would enable one to exclude the others from a patent before he himself was properly entitled to claim it. Here the patentee has evidently intended to draw off attention from the real subject matter of his claim, which is not an improvement in any thing essential to a carriage, but merely a mechanical help to the opening and closing of German shutters. The list of titles given in Mr. Webster's Treatise (a) contains, among those which have been deemed good, none so vague as that in question. [MAULE, J. You say that the description ought to be sufficiently certain, not for all persons, but for persons in the particular line of business.] For all who are interested. [MAULE, J. Then is not it a matter of fact, to be alleged and proved, that the description was not particular \*enough for such persons?]

\*1060] The judge appears to have decided this point in *Lord Cochrane v. Smethurst*, 1 Stark. N. P. C. 205. [TINDAL, C. J. If any thing depends here on connecting the title with the specification, this verdict is insufficient; for it does not find that the specification mentioned in the 6th plea existed. ALDERSON, B. The question on this record comes to the mere point of law as to the title, whether "improvements in carriages" may be construed, improvements in all carriages. PARKE, B. It being found that, in fact, the invention is not an improvement in all carriages.] As to the cases cited on the other side: *Sturz v. De La Rue*, 2 Russ. 322, is consistent with the argument for the defendants. The invention was applicable, in a certain particular, to copper and other plate printing generally. The fact, now stated on the other side, that it was not available for large prints, does not appear to have been brought to the lord chancellor's notice. *Rex v. Wheeler*, 2 B. & Ald. 345, is, in principle, the same with this case. [PARKE, B. ABBOTT, C. J., there seems to have read the words "preparing malt," as if they meant making the malt from barley. But, whether he was right in this or not, the law laid down clearly was, that the title did not describe the invention as it was subsequently explained by the specification.(b) ALDERSON, B. The law is plain enough, though

(a) Law and Practice of Letters Patent for Inventions, 1841. See p. 45, note (c).

(b) "It is held that there must be an agreement between the title given to the invention in the patent, and the description of it in the specification; in other words, the language of the patent may be explained and reduced to a certainty by the specification, but the patent must not represent the party to be the inventor of one thing, and the specification show him to be the inventor of another." Epitome of the Law relating to Patents, &c., by J. W. Smith, p. 19, sect. 7.



it is not so \*clear whether the fact was rightly understood.] In *Fisher v. Dewick* (a) the title was not open to the objection now [\*1061 taken: the invention was in reality an improvement on the ordinary machinery for making bobbin net lace. *Lord Cochrane v. Smethurst*, 1 Stark. N. P. C. 205, is in point. The invention there was an improvement upon one mode of lighting cities, towns, and villages; yet the patent was held too general in its terms, and therefore void. *Jessop's Case* (b) as cited in 2 H. Bl., is an authority for the defendants.(c)

Sir *F. Pollock*, attorney-general, in reply. If the words "improvements in carriages" mean improvements in some carriages, *Sturz v. De La Rue*, 5 Russ. 322, is a decisive authority for the plaintiff. And the words must be so understood: a patentee does not profess to be acquainted with every article of a class which he refers to. What is a reasonably precise description, considering the subject matter, is a question of fact in each case. In *Lord Cochrane v. Smethurst* there was reason to suspect that the object was concealment.

*Cur. adv. vult.*

\*TINDAL, C. J., in Hilary vacation (February 1st) 1844, delivered the judgment of the court. [\*1062

This was an action on the case against the defendants for the infringement of a patent taken out by the plaintiff for "improvements in carriages;" and the question raised before the court below, and also in the argument before us in the Court of Error, arises upon and was confined to the issue raised on the 6th plea, and the special verdict found thereon. The 6th plea, after setting out the specification *in hæc verba*, averred "that, although the said alleged invention in the declaration and letters patent respectively mentioned is therein styled and described as 'improvements in carriages,' yet the said invention in truth and in fact is not an invention of improvements in carriages generally, but of certain alleged improvements in the fixing and adapting German shutters in those carriages only in which German shutters are used; and that German shutters cannot be used in divers and very many carriages, to wit coaches, chariots, and other covered carriages of the like kind: and so the defendants say that the title of the said invention is too large and general, and by reason thereof the said letters patent are void and of no force." The plaintiff replied to this 6th plea that the invention was an improvement in carriages: upon

(a) Ante, p. 1058.

(b) Cited in *Boulton v. Bull*, 2 H. Bl. 476, 489.

(c) The following cases were also mentioned on behalf of the defendants, on this and the former argument, as showing the degree of accuracy required where a patent is taken for something new, combined with that which has already been in use. *Bovill v. Moore*, 2 Marsh. 211; *Rex v. Metcalf*, 2 Stark. N. P. C. 249; *Rex v. Elze*, Dav. Pat. Ca. 144 (which is, nearly verbatim, the same with S. C. 11 East, 109 note (c)); *Manton v. Parker*, Dav. Pat. Ca. 327; *Minter v. Mower*, 6 A. & E. 735; and *Brunton v. Hawkes*, 4 B. & Ald. 541; in which cases objections were taken and prevailed; and *Hornblower v. Boulton*, 8 T. R. 95, where the description in the patent, compared with the specification, was held reasonably certain.

which the issue was raised. At the trial, the jury found upon this issue that the invention "is not an invention of improvements in carriages generally, but of certain improvements in the fixing and adapting German shutters in those carriages only in which German shutters are used;" the finding being in the precise terms used in the 6th plea: and the question before the court below was whether the letters patent, "by \*1063] reason of the title of the invention being too large and general, was, as alleged in the 6th plea, "void and of no force."

Upon the argument before the court below, that court held the finding to be in favour of the defendants, and gave judgment accordingly, upon the ground that, from the vagueness and uncertainty of the title of the patent, that is, from the title of the patent being too general, the patent itself must be held to be void. It is to be observed that the decision does not proceed upon the ground that the title of this patent must be held of necessity to claim more than the invention as explained by the specification, as if the title had been "an invention for the improvement of *all* carriages," and the specification had limited the invention to the improvement of one or more species of carriages only, or if the title had been for the invention of two things, and the specification had shown it to be an invention of one only out of the two. In such cases, it may be readily admitted that the patent would be void: in the first, because there was no specification enrolled agreeing with the title; in the second, on the principle laid down by BAYLEY, J., in his judgment in *Brunton v. Manoles*, 4 B. & Ald. 541, 553, that the entire discovery of all the things for which the patent was taken out may be held to be the consideration upon which the patent was granted by the crown. But such objection would not apply to the case now before us; for the words "improvements in carriages" do not necessarily import "in all carriages," but, in their ordinary use, may well be held to be satisfied by an invention for improvements in "some carriages only. But the ground of the \*1064] decision is, as before stated, confined to the vagueness and generality of the title, and to that only. Now the mere vagueness of the title appears to us to be an objection that may well be taken on the part of the crown before it grants the patent, but to afford no ground for avoiding the patent after it has been granted. If such title did not agree with the specification when enrolled, or if there had been any fraud practised on the crown in obtaining the patent with such title, the patent in those cases might, undoubtedly, be held void. Any evidence of a design on the part of the inventor to choose a vague and general title, in order that he might avail himself, at the time of the enrolling of the specification, of an invention not discovered by him at the time of taking out the patent, or in order to prevent other subjects of the queen from availing themselves of a discovery made by them upon the ground of its falling

within the range of the general terms of the title, although such invention was different from that for which the patent was really and in truth taken out, might afford such proof of fraud upon the crown and such injury to the subject, as that the vagueness and generality of the title in such case might avoid the patent. But, in the present case, no such evidence was given, nor was the existence of fraud suggested: but the patent has been held void upon the mere ground of the title being so large as to be capable of comprising a different invention from that which is described in the specification, and from no other cause.

And we think it would be unsafe, without express authorities to the point, to lay down the rule in terms so large as it appears to have been adopted by the \*court below; for that it would endanger the validity of very many patents which have hitherto been held free [\*1065 from exception, if every patent must be held to be void simply on the ground that its title was conceived in such terms as to be capable of comprising some other invention besides that contained in the specification, in the absence, at the same time, of any proof of intention of committing a fraud on the crown or of deceiving or misleading the public. It would, in many cases, require extreme accuracy, and nearly as much consideration as is necessary for drawing the specification, to frame a title for the patent which should be perfectly secure against ingenious objections to its latitude and extent.

The cases principally discussed and relied on below were those of *Lord Cochrane v. Smethurst*, 1 Stark. N. P. C. 205, and *Jessop's Case*, cited from the argument in *Boulton v. Bull*, 2 H. Bl. 476, 489. If the former were to be considered as having the authority of a case which had been discussed fully in the court above, and had received a determination there, it would at least be open to the observation that the extreme generality of the title far exceeds that which is now under consideration: but that case never was moved in the Court of King's Bench; and it is impossible not to see, from the other objections taken at *Nisi Prius* to the patent, some of which were unanswerable, that it would have been useless to have carried the case farther. The authority of that case cannot, therefore, be rated higher than that of the opinion of the learned judge who tried the cause. And, as to *Jessop's Case*, as cited by BULLER, J., in his judgment in the case of *Boulton v. Bull*, 2 H. Bl. 489, it appears to differ widely from the \*present. The patent in that case, so far as the facts are to be collected from the report, was taken out [\*1066 for "a watch." Now a watch does, in its primary sense, import an entire and indivisible article; whereas a patent for improvements in carriages is any thing but a definite and precise thing. When, therefore, it appeared, by the specification or otherwise, that the invention was, in fact, limited to an improvement or addition to a watch only, this was not a case

where the title was simply too vague and general, but where the title of the patent claimed a precise invention larger and more extensive than the invention itself; that is, it was a case of direct variance from the title of the patent.

We think therefore that, as, in the present case, no more is objected than mere vagueness and generality in the title of the patent, without any evidence leading to the inference of fraud upon the crown or prejudice to the public, enough has not been shown to avoid the patent: a conclusion which coincides in substance with the determination of the Court of Exchequer in the case of *Neilson v. Harford*, 8 M. & W. 806, 826.

And, although the finding of the facts under the 6th issue authorizes a verdict to be entered for the plaintiff thereon, yet, as, for the reasons above given, we think that issue is raised on a plea which discloses no answer to the declaration, there must upon the whole record be a judgment for the plaintiff, non obstante veredicto on that issue.

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It was proved that defendant had notice of the gravel being laid, and had been guilty of want of care in leaving it there, and that this had caused the accident.

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*Held*, that the inducement was proved by evidence that a person had been murdered, that H. was charged with the murder, and that, on an inquest held upon the body, witnesses called the dead person by the name of G.; and *Held*, that this last fact might properly be proved by the coroner who held the inquest, and that he might, for this purpose, use an instrument which he had drawn up as an inquisition, whether it was or was not a valid and formal inquisition.

C. was described in the information as His Serene Highness, Charles Frederick Augustus William, Duke of Brunswick and Luneburg. His name was Charles Frederick Augustus William D'Este, and although he had formerly been reigning Duke of Brunswick and Luneburg, and was still commonly called by that title, he had ceased to be reigning duke de facto.

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*Held*, that the words requiring the teste to be "on a day certain" mean a day in term.

*Held*, also, Lord Denman, C. J., dubitante, that, where a mandamus had, under the direction of a special pleader, been drawn with a teste out of term, and so issued, and a return had been made and demurred to, whereupon the defendants objected that the writ was wrongly tested, the court, by its general authority, might amend the teste on motion by the prosecutor. For,

That the mistake was that of the officer, not the party, the officer being bound to see that a proper teste was affixed, and not adopt an irregular one given by the prosecutor;

That the mistake arose from a misconstruction not unreasonable.

And that the court, knowing the date at which the rule for a mandamus was made absolute, might amend according to that date.

Mandamus, to the verderers of a royal forest, recited that the Chief Justice and Justice in Eyre had granted license to the prosecutor to hunt, &c., in the forest, provided the license were brought to the next court for the said forest, to be enrolled among the records there: and that the defendants had refused to enrol; the writ therefore commanded them to enrol the license at the next court of attachment. Return, that the forest was not within any manor, &c., of the prosecutor, nor was he seised, &c., of the said forest, for any estate whatever; and that the license purported to extend over lands within the forest, of which A., B. and C. were seised of estates of freehold, and were the occupiers.

*Held*, on demurrer to the return, that the license was void as to the last-mentioned lands, and therefore the court could not grant a mandamus to enrol it.

The defendants also returned, that the verderers had not been required by the Chief Justice and Justice in Eyre, or by any Court of the Forest, to enrol the license.

*Held*, on demurrer to the return, that this also was an answer to the writ, for that the Court of the Chief Justice in Eyre had power to compel obedience in the verderers, who were its officers, and therefore the Court of Queen's Bench ought not to interfere, unless in a case of urgent necessity. Judgment for defendants. *Regina v. Conyers*, 981.

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Lands were conveyed to such uses as K. should appoint, and in default of and until appointment, to K. and his assigns for K.'s life, and, from and after the determination of that estate in K.'s life-time, to a trustee for K. and his assigns, and to bar dower; and, from and after K.'s decease, to K.'s heirs and assigns.

*Held*, that during K.'s life-estate, and before such appointment, K. was a party enabled to charge the fee-simple in possession with an annuity, within the meaning of stat. 53 G. 3, c. 141, s. 10, and therefore the annuity (being of the value required by that clause) did not need enrolment under sect. 2.

By an annuity deed, reciting conveyances in fee to K., the grantor, of certain premises, K. covenanted to B., the grantee, that if the annuity should be in arrear 14 days, B. might enter on the premises and distrain; if 21 days, B. might enter and take the rents and profits until the arrear should be satisfied. It was then witnessed that, for further securing the annuity, K., with the consent and by the direction of B., appointed (under a power vested in K.) and demised, to H. (party to the annuity deed,) his executors, &c., for 99 years, the premises before mentioned, then in the occupation of K., which premises it was agreed by the same clause should, for the purposes of the deed, be considered as held and occupied by K. as tenant to H. at the yearly rent of 500*l.* payable on the same day as the annuity. The demise for 99 years was on trust to permit K. to take the rents and profits till default in payment of the annuity; and, if the annuity should be in arrear 30 days, then, out of the rents and profits, or by demising, selling or mortgaging the premises for any part of the 99 years, to raise sufficient money for payment of the arrears, and apply the same accordingly, paying K., or permitting him to receive, the residue.

On default for 30 days in payment of the annuity, ejectment was brought, on the

several demises of B. and H.; and a verdict was found for the plaintiff on B's demise, but for the defendants on that of H. (under the judge's direction) because H. had not given K. notice to quit.

On motion for a new trial on the ground that the plaintiff could not recover on B's demise by reason of the term in H. and the tenancy of K.; *Held*, that the verdict on that demise was rightly found: for that the first clause of entry entitled B. to maintain ejectment after 21 days' default, and that right was not taken away by the creation of a term in H. in the manner and for the purposes stated.

*Semble*, that, if H. had mortgaged the premises for payment of the annuity, B. could not have brought ejectment while the mortgage subsisted. *Doe dem. Butler v. Lord Kensington*, 429.

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The arbitrator awarded that the proceedings in the cause should cease; and that H. had good cause of action against B. and was entitled to a verdict; and he assessed the damages at 40s., to be paid by B. to H. and to C.; who, as the award stated, consented to become a party in the cause.

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shall stand for a certain sum, an application to set the award aside must be made within four days of notice being given that the award is made, unless some excuse for delay be shown, such as would, in the case of a verdict, induce the court to allow a motion for a new trial after the expiration of the usual four days.

The same rule was held applicable where the arbitrator was directed to state for the opinion of the court such points of law as the parties should raise, and he awarded a verdict for the plaintiff, unless the court should otherwise order, for a sum named, stating points, and directing that the verdict should be reduced or increased, or a verdict be entered for the defendant on certain issues, according to the decision of the court; and the defendant afterwards moved to set the award aside, or to enter a verdict for the defendant on some or all of the issues, upon matter apparent on the face of the award. *Paxton v. Great North of England Railway Company*, 938.

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When an attorney, under such circumstances, had been admitted to this court on payment of an additional 60*l.* only, the court, on motion made within a year of such admission, but more than a year after his admission to the court of Common Pleas at Lancaster, (see stat. 6 & 7 Vict. c. 73, ss. 29, 45,) ordered him to be struck off the roll unless he paid an additional 60*l.* in a month; though, before paying the second duty, he had been informed at the Stamp-office that 60*l.* was sufficient. *In re Myres*, 515.

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*Held*, that an unqualified person so acting as an attorney may be indicted under the substantive prohibitory clause, sect. 2, for a misdemeanor, and that sects. 35, 36 do not limit the punishment for the offence to the particular incapacity and punishment there specified. *Regina v. Buchanan*, 883.

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1. After conviction on defective indictment.

An attorney of this court was convicted and received judgment on an indictment

charging a conspiracy to defraud parties of goods, and that, in pursuance thereof, one conspirator obtained the goods on credit, and the attorney seized them by a collusive execution which he sued out against such conspirator. Judgment was reversed for insufficiency of the indictment.

*Held*, a sufficient ground for striking him off the roll, though no affidavit was made that he had committed the offence, but only that he had been convicted; and though he deposed that the money produced by the execution was justly due to him from such alleged conspirator, and denied that he had been "a party or privy to such criminal conduct," as was stated in the indictment, or that it contained any offence punishable by law; the affidavit not specifically denying the conspiracy, or that the act charged was done in pursuance of it. *In re King*, 129.

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G. recovered judgment in an action of debt against D., and employed his attorney (to whom he had previously assigned the debt in repayment of advances) to sue out execution. The attorney, who lived at Cheltenham, caused a *fi. fa.* to be sued out, directed to the sheriff of Buckinghamshire, to levy on D.'s goods; and the attorney's London agent endorsed on the writ: "The

defendant resides at Wolverton, and is an innkeeper. Levy," &c. D. was, at the time, residing with his mother-in-law, at an inn, of which she was the proprietor, at Wolverton, and was assisting her in the management, but had no interest in the premises or the goods upon them. The sheriff, in execution of the *fi. fa.*, seized goods of the mother-in-law at her inn. She brought trespass against the attorney, and obtained a verdict upon issues joined on pleas of Not Guilty and denial of her property in the house and goods. On motion to enter a verdict for defendant,

*Held*, that the verdict against the attorney on the issue upon Not Guilty was maintainable, the facts furnishing evidence that he had directed the sheriff to levy on plaintiff's goods. *Roules v. Senior*, 677.

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*Held*, that he could not recover against defendant for the disbursements.

Defendant, in the course of the proceedings, advanced plaintiff 100*l.* for carrying them on; and he applied it accordingly.

*Held*, that in action by plaintiff for professional charges and disbursements, defendant could not set off the 100*l.* as money received by plaintiff to his use. *Lewis v. Samuel*, 685.

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## III. Reputed ownership.

Not of securities held for specific purpose.

C. being indebted to defendants in a sum not yet payable, and pressed by them for security, handed to them a note by which C.'s debtor, S., promised to pay C. a sum exceeding C.'s debt to defendants. This note was not payable to order; but C. endorsed it when he handed it over. Afterwards defendants pressed C. to obtain negotiable paper from S. instead of the note, which they re-delivered to C. for that purpose; S. thereupon, after the term for C.'s paying defendants had elapsed, took back the note, and accepted bills of exchange drawn by C., exceeding C.'s debt to defendants, which bills C. desired him to give to the defendants. At the time of the acceptance, C. intended to commit an act of bankruptcy, which S. knew; but defendants did not know it. After the act of bankruptcy, S. delivered the bills to defendants. In trover by C.'s assignees, for the bills, issue being joined on a plea of Not possessed,

*Held*, that though S. was not agent for defendants, the bills were not, at the time of the act of bankruptcy, in C.'s possession

as reputed owner with the consent of the true owners, within stat. 6 G. 4, c. 16, s. 72, merely as being in C.'s hands; inasmuch as they were subject to the same rights as the note, which C. held only for a specific purpose, as agent for defendants.

But that, nevertheless, if S. did not know of the assignment by C. to defendants of the debt due from S. to C., the assignment was not good as against the plaintiffs; and therefore, as against them, the defendants had no title, legal or equitable, to the note, even while it remained in their hands, and consequently, none to the bills. But that, if S. did know, defendants were entitled to succeed on the issue. *Belcher v. Campbell*, 1.

## IV. Uncertificated bankrupt; his incapacities.

Drawing and endorsing bills, 473. **BILLS**, II.

V. Proceedings in insolvency, 610. **INSOLVENT DEBTOR**, I.**BARON AND FEME.**

Proceedings against each other.

Ejectment.

The nominal plaintiff in ejectment may recover against a married woman who has entered into the common consent rule, though it appear on the trial that the lessor of the plaintiff is, and was at the time of the demise laid in the declaration, the defendant's husband. *Doe dem. Merigan v. Daly*, 934.

**BARRISTER.****COUNSEL.****BASTARD.**

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**BILL.**

I. To perpetuate testimony, 208. **EVIDENCE**, XIII. 1.

II. Attorney's Bill, 685. **ATTORNEY**, X. 1

**BILL OF ENTRY.**

Page 595. **CORN**.

**BILL OF EXCEPTIONS.**

Form.

Ought to select the precise point in the summing up, and not to state the whole at length. *Soares v. Glyn*, 25.

**BILLS OF EXCHANGE AND PROMISSORY NOTES.**

## I. Drawer of Bill.

1. Uncertificated bankrupt, 473. *Post*, II.

2. Discharge of by endorsee's forbearance to acceptor, 500. *Post*, X. 2.

## II. Acceptor. estoppel by acceptance.

In an action by a bona fide endorsee against the acceptor of a bill of exchange, the defendant is estopped from pleading, that the drawer and first endorser was an



uncertificated bankrupt when the acceptance was given. *Braithwaite v. Gardiner*, 473.

### III. Maker of note : discharge.

Where payee, a composition creditor, has nevertheless proved for the full amount against the principal's estate, 966. **COMPOSITION**, I.

### IV. Promissory note.

In what form not negotiable.

#### 1. Bankrupt, III.

### V. Check.

#### 1. Date.

A check is sufficiently dated to satisfy the exemption clause, sect. 15, of the Stamp Act, 9 G. 4, c. 49, if it bear date, "Dorchester Old Bank," and there be in fact a bank so called in the town of Dorchester, and there be no proof that the check was drawn elsewhere than at Dorchester. *Strickland v. Mansfield*, 675.

#### 2. Stamp, 675. Ante, 1.

#### 3. Place of drawing, 675. Ante, 1.

### VI. Endorsement.

#### 1. To unnamed officer, as such. he obtains absolute title to the bill.

Declaration in assumpsit stated that E. drew a bill of exchange on defendants, payable to order of O.; that defendants accepted; that O. endorsed to "The Treasurer General of the Royal Treasury of Portugal;" and that C. then being the Treasurer General aforesaid, endorsed to plaintiff.

Pleas. 2. That the said Treasurer General of the Royal Treasury of Portugal did not endorse to plaintiff: and issue thereon.

3. That the said Treasurer General, by whom the endorsements were alleged to have been made, at *the time when he endorsed* was not such Treasurer General as was designated and intended by the endorsement of O., but minister of a hostile government, and had no title or authority to endorse: replication, that the Treasurer General who endorsed was the Treasurer General designated, &c. (not adding *at the time*, &c.); and issue thereon.

It was proved that the bills were endorsed for the use of M., then king of Portugal, and received by C., being then, and at the time of the first endorsement, his treasurer; but that, after M.'s government had been subverted by a hostile one, and C. removed from office, C. endorsed.

*Held*: That C., by the endorsement and delivery to himself, acquired an absolute title to the bills, and a power to endorse, which could not be qualified by any intention of O. not expressed in the endorsement even if such qualification could be annexed to an endorsement at all; and *semble* that it could not: and that it was immaterial whether C. was Treasurer General at the

time of his endorsing over or not, and that the words *at the time*, &c., were therefore properly omitted from the issue taken. *Soares v. Glyn*, 24.

#### 2. Qualification of endorsement, 24. Ante, 1.

#### 3. To treasurer of government de facto, effect of change of government, 24. Ante, 1.

#### 4. Time of, when immaterial, 24. Ante, 1.

#### 5. By uncertificated bankrupt, 473. Ante, II.

### VII. Place.

Of drawing check, 675. Ante, V. 1.

### VIII. Collateral contract.

Objection that it is not in writing. *Gillet v. Whitmarsh*, 969.

### IX. Held for specific purpose.

When not in reputed ownership of holder, 1. **BANKRUPT**, III.

### X. Giving time.

#### 1. By agent taking bill, instead of receiving the amount in money and applying it to his own demand against his principal.

To assumpsit for money paid, &c., defendant pleaded, as to part, that, after the accruing of the causes of action and before action brought, B. was indebted to defendant in a sum exceeding the sum pleaded to, by decree of a Scotch Court, and was imprisoned to enforce payment: and that, after the accruing, &c., and before action brought, plaintiff was authorized by defendant to receive from B. the amount pleaded to, part of the debt from B. to defendant, and to retain and appropriate it in full satisfaction and discharge of the cause of action pleaded to, and to receive the residue from B., and hold it on behalf of defendant. That plaintiff, instead of receiving the amount pleaded to in satisfaction and discharge, elected to, and did, at the request of B., and without the knowledge or consent of defendant, receive and take from B. a bill of exchange, to the amount of the sum pleaded to, for and on account of that amount, parcel of the debt due from B. to defendant, and appropriated and retained the bill to and for the liquidation and discharge of the moneys and causes of action pleaded to; and, without the license, &c., of defendant, authorized and procured the discharge of B. from imprisonment without receiving the residue of the debt owing from B. to defendant, and without any part of the residue being satisfied or discharged.

On special demurrer, objecting that the plea did not properly show accord and satisfaction, or set-off.

*Held*, a bad plea. *Baillie v. Moore*, 489.

#### 2. By holder to acceptor.

To an action on a bill of exchange by endorsee against drawer, defendant pleaded that the drawee accepted, and plaintiff afterwards sued drawee on the bill, and



while that suit was pending, in consideration of 2*l*., agreed with the drawee that plaintiff should stay all further proceedings, and forbear continuing to sue, for two months, during which time plaintiff could have continued further proceedings; which agreement was without the drawer's (now defendant's) consent; and that, in pursuance of the agreement and without the drawer's consent, plaintiff did stay all further proceedings and forbear continuing to sue the drawee.

*Held*, a good plea, though it did not expressly aver that the endorsee could have obtained judgment against the drawee before the time until which he agreed to forbear.

The plaintiff in the present action traversed the agreement set out in the plea; and issue was joined. *Held*, that the drawer supported the issue on his part by merely proving the agreement, and that plaintiff was not entitled to show, in answer, that judgment could not have been obtained earlier than the time until which he had agreed to forbear. *Isaac v. Daniel*, 500.

**XI. Pleading.**

1. Time of endorsement, when immaterial, 24. *Ante*, VI. 1.
2. Plea of drawer being uncertificated bankrupt, 473. *Ante*, II.
3. Plea of giving time by taking, 489. *Ante*, X. 1.
4. Plea of time given to acceptor, 500. *Ante*, X. 2.
5. Forbearance in fact not put in issue by traverse of agreement to forbear, 500. *Ante*, X. 2.
6. Discharge of composition surety by proof for full debt against the principal's estate, 966. *Composition*, I.

**XII. Evidence.**

1. Note for interest, is evidence of principal being still due, 115. *Interest*, II. 1.
2. Under traverse of agreement to forbear, 500. *Ante*, X. 2.
3. Place of drawing check, 675. *Ante*, V. 1.

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Liability to censure by, 640. *Church*, I. 1.

**BONA FIDES.**

Of justice of the peace, 13. *Conviction*, III. 1020. *Justice*, IV. 1.

**BOND.**

**Interest.**

On corporation bond, 926. *Statute*, XLIII. 2.

**BOOKS.**

Public, inspection, 689. *Evidence*, VI. VOL. VIII.

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**BOUNDARY.**

Jurisdiction of tithe commissioners as to, 32, 43. *Tithe*, I. 1, 2.

**BREACH.**

**I. Of contract.**

1. Of promise of marriage, 358. *Marriage*, I. 1.
2. Of contract to assign, 371. *Contract*, XII. 2.
3. By a party disabling himself from performance, 358. *Marriage*, I. 1. 371. *Contract*, XII. 2.

**II. Of discipline, 640. Church, I. 1.**

**BRITISH SUBJECT.**

Who is, 208. *Evidence*, XIII. 1.

**CANON.**

Against relinquishment of holy orders, 672 *Church*, I. 1.

**CASE.**

**I. When it lies.**

1. Notwithstanding statutory remedy, where that not coextensive.

*Case.* Declaration stated that defendant, after 9th of November, 1835, and, after the first election of councillors under stat. 5 & 6 W. 4, c. 76, was appointed and acted as town clerk of the borough of L., and continued to be and act as such town clerk, until the expiration of his office by his lawful removal; that, after such removal, and within three months after the expiration of defendant's office, the council of the borough, in pursuance of the statute, duly authorized and appointed A. to receive from defendant, and required defendant to deliver to A. a true account in writing of all matters committed to defendant's charge as such town clerk by virtue of the act, and also of all moneys, &c., together with proper vouchers, &c., and also a list of the names of debtors, &c.; of which premises defendant, within the three months, had notice, and was, within the three months, required by A., pursuant to the authority, to deliver to A. the said matters and things which A. was so authorized to receive; that, since defendant had such notice, &c., and within the three months, a reasonable time for the delivery had elapsed; that, before the expiration of defendant's office, to wit, on, &c., divers matters and things were committed to his charge under the act, and for the corporation, viz., certain deeds, &c.; that, during the time aforesaid, defendant received moneys amounting, &c., by virtue and for the purposes of the act and had not ren-

dered any account thereof to plaintiffs; and that, before and at the expiration of defendant's office, there were divers persons from whom moneys were due for the purposes of the act, which ought to have been received and accounted for to plaintiffs by defendant, but who had not paid the same: Breach, that, though it was defendant's duty to deliver the said matters and things to A., and A. all the time continued to be authorized to receive them, defendant had not delivered them to A.; by means whereof plaintiffs were kept in ignorance of matters which ought to have been contained in the account, list, and vouchers, and had been prevented from obtaining moneys which they might have obtained if defendant had performed his said duty, and from carrying on the business of the corporation, &c.

*Held*, on special demurrer, that an action on the case for the breach of duty lay against the defendant, and that plaintiffs were not restricted to the summary remedy, under stat. 5 & 6 W. 4, c. 76, s. 60, before justices of the peace. And that the appointment of A. to receive the several matters and things, and the duty of defendant to deliver them, were sufficiently alleged. *Lichfield, Mayor, &c. v. Simpson*, 65.

2. Against custom-house officer, for not assigning bill of entry, 595. **CORN.**

3. For accident occasioned by permissive obstruction of highway, 286. **ACTION**, II. 1.

## II. Declaration.

What count cannot be regarded as a count in case, 1000. **FISHERY**, I. 1.

## CAUSE.

Probable, 709. **PERJURY**.

## CERTAINTY.

I. In title of patent, 1044. **PATENT**.

II. Of amount of premiums paid by assignee of policy for assignor, 866. **DEBT**, II.

## CERTIFICATE.

I. To exempt society from ratability, 719, 729, 745. **POOR**, VIII.

II. For immediate execution, 931. **EXECUTION**, I.

III. Attorney's renewal, 638. **REGULA GENERALIS**.

IV. Of chargeability, 889. **POOR**, XIX. 6.

V. Of order of court, 161. **LANDLORD AND TENANT**, X. 1.

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I. When it lies.

1. What order a judicial proceeding removable by, 75. **CLERK OF THE PEACE**, I.

2. To quash order bad in part, when, 75. **CLERK OF THE PEACE**, I.

3. To quash orders of Town council, 926. **STATUTE**, XLIII. 2.

## II. When granted.

Though document already in court, 43. **TITLE**, I. 2.

## III. What points may be gone into.

1. Where granted under clause partially restoring the writ, 43. **TITLE**, I. 2.

2. On arguing special case, 547. **POOR**, XXIX. 1.

## IV. Side bar rule.

Proceeding by, when not equivalent to motion in court, 547. **POOR**, XXIX. 1.

## CHAMBERS.

Judge at, 524. **APPLICATION**, I. 2.

## CHANCERY.

I. Proceedings on petition of right, 208. **EVIDENCE**, XIII. 1.

II. Bill to perpetuate testimony, 208. **EVIDENCE**, XIII. 1.

## CHAPEL.

Unconsecrated and unlicensed, 640. **CHURCH**, I. 1.

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I. Evidence of, 571, 572, 889. **POOR**, XIII. 2, 3, XIX. 6.

II. Certificate of, 889. **POOR**, XIX. 6.

## CHARITY.

I. Special nature of trusts, 394. **POOR**, VI. 2.

II. Special character of trustees, 394. **POOR**, VI. 2.

III. Legal estate, in trustees, or in parish officers, 382. **CHURCHWARDENS**, I. 1, 394. **POOR**, VI. 2.

## CHARTER.

Incorporating trustees of a private franchise, 946. **QUO WARRANTO**, I.

## CHARTER-PARTY.

Exception during the voyage.

Plaintiff and defendants agreed by charter-party that a ship, then at Liverpool, of which plaintiff was master, should, with all convenient speed, be made ready, and should, at L., receive and load from the charterers' agents a full cargo, and being so loaded, should proceed to Stettin and deliver the same and so end the voyage, restraints of princes, &c., "during the said voyage, always mutually excepted;" and the ship was to be loaded at L., without detention; and defendants thereby agreed to load the vessel at L., as in the charter-party stated with the said cargo, at L.

On general demurrer to a declaration in assumpsit, assigning for breach of the above agreement that defendants did not load the ship at L. without detention, but detained her at L. an unreasonable time (not negating restraints of princes, &c.): *Held*,

That the exception as to restraints of princes, &c., was applicable only after the ship quitted Liverpool. *Crow v. Falk*, 467.

II. Pleading.

Omission to negative exception, 467.  
Ante, I.

CHATTEL.

I. Destruction by joint owner, 908. *TROVER*, III. 1.

II. Annexations to freehold, 913. *FIXTURES*.

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CHILD.

I. Illegitimate, how described, 410. *POOR*, XVI.

II. Indictment for maltreatment, 959. *INDICTMENT*, I. 1.

III. See also *INFANT*. *PARENT AND CHILD*.

CHOSE IN ACTION.

Assignment of: who must sue.

Defendant was the treasurer of a Derby lottery, and received the subscriptions. Tickets marked with the names of horses entered to run for the Derby stakes were issued to the subscribers; and it was understood that the holder of a ticket bearing the name of a winning horse would receive a prize in money. Defendant received 5s. for each ticket, and was to pay the prizes. The holder of a ticket purchased of defendant sold it to plaintiff. There was no written contract between any of the parties; and the party who bought of defendant subscribed as for himself. The horse named on plaintiff's ticket won.

*Held*, that plaintiff could not recover the amount of the prize from defendant, there being no privity between them. *Jones v. Carter*, 134.

CHURCH.

I. Correction for breach of discipline.

1. What dissenter not exempt from.

The fourth section of the Toleration Act, 1 stat. 1 W. & M. c. 18, exempting persons who shall take the oaths and subscribe the declaration there mentioned from prosecution in the Ecclesiastical Court for nonconforming to the Church of England, extends not only to lay persons, but to clergymen who, after being ordained, dissent from the church.

*Semle*, that, to claim this exemption, it is sufficient that the party states himself to be a dissenter, without any more formal act.

But a person ordained a priest in the Church of England cannot, in this manner or otherwise at his own pleasure, divest

himself of his orders, so as to exempt himself from correction by the bishop for breach of ecclesiastical discipline.

Performance, by such priest, of the church service in an unconsecrated chapel, not licensed by the bishop, and against his monition, is such a breach of discipline, and not a mere act of nonconformity protected by the Toleration Act or by stat. 52 G. 3. c. 155.

So held on motion for a prohibition, where articles had been exhibited in the Ecclesiastical Court, under stat. 3 & 4 Vict. c. 86, against a priest for such irregular performance of service, and he put in defensive allegations, stating that, before he did the acts complained of, he had seceded from the Church of England, and was minister of a congregation of Protestant dissenters, assembling in the unlicensed chapel. Prohibition refused. *Barnes v. Shore*, 640.

2. What performance of divine service is a breach, 640. Ante, 1.

II. Nonconformity.

1. What it is, 640. Ante, I. 1.

2. To whom the Toleration Act extends, 640. Ante, I. 1.

3. Exemption, how claimed, 640. Ante, I. 1.

III. Priest.

Liability to correction by bishop, 640. Ante, I. 1.

IV. Pew.

Repairs by municipal corporation, 926. *STATUTE*, XLIII. 2.

CHURCHWARDENS.

I. Vesting of property in.

Buildings and lands were conveyed by B. and G. to N. and R. in fee, to the use of B., G., N. and R., in fee, "upon trust to receive and take, or otherwise permit and suffer the churchwardens" of a parish "for the time being, yearly for ever to receive and take the rents, issues, profits and annual payments and proceeds," "as the same should arise or become payable, for or towards the repair of the parish church," "and for the benefit of the said parish, so and in such manner as the same had theretofore been usually or lawfully applied and disposed of, and according to the intentions of the several charitable persons who gave or devised the said premises respectively; they, the said churchwardens, yearly at Easter accounting to the parishioners," "in vestry assembled for the same."

Among the parcels conveyed were four cottages, described in the conveyance as situate in the parish, "wherein poor families were permitted to dwell rent-free."

*Held*, that the property vested, under stat. 59 G. 3, c. 12, s. 17, in the parish officers, and that they were the proper parties

to sue for use and occupation of the premises conveyed; and that such action could not be maintained by the trustees. *Rumball v. Munt*, 382.

## II. Actions by churchwardens.

1. When the proper parties to sue, 382. *Ante*, I.
2. When not the proper parties to sue, 394. *Poor*, VI. 2.

## CLERGYMAN.

- I. Becoming a dissenter, 640. *Church*, I. 1.
- II. Relinquishment of orders, 640, 672. *Church*, I. 1.

## CLERK.

- I. Misprision of, 981. *Amendment*, I. 515. *Attorney*, I.
- II. Attorney's: stamp duties, 515. *Attorney*, I.

## CLERK OF ASSIZE.

His certificate of order of court, 161. *Landlord and Tenant*, X. 10.

## CLERK OF THE PEACE.

### I. Fees.

In misdemeanor.

A table of the fees and allowances to be taken by the clerk of the peace for the county of S. was, in 1826, duly settled and approved by the sessions, and confirmed by the Judges of Assize, under stat. 57 G. 3, c. 91. It authorized the taking of traverse and other fees from defendants in misdemeanor, and was acted upon till 1844, when the sessions made an order that no officer of the court should thereafter take or demand any fee or payment from any defendant in misdemeanor. Stat. 8 & 9 Vict. c. 114, was afterwards passed, which prohibits the taking of certain fees from defendants who are acquitted, or discharged by proclamation.

*Held*, on motion to quash the above orders, removed by certiorari.

That the order was a judicial proceeding, removable by certiorari.

That the order was illegal, assuming to abolish fees which had been regularly ascertained under stat. 57 G. 3, c. 91; and

That, stat. 8 & 9 Vict. c. 114, not having prohibited all such fees, this court was bound to interfere, by quashing the order. *Regina v. Coles*, 75.

### II. Antiquity of the office, 75, 80. *Ante*, I.

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Additions of, 533. *Defamation*, V.

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- I. Of assize, 161. *Landlord and Tenant*, X.
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- III. Under petition of right, 208. *Evidence*, XIII. 1.

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- I. Tithe commissioners, 32, 43. *Tithe*, I. 1, 2.
- II. Of land-tax, 63. *Evidence*, XX. 1.

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- I. Bad, supported by good conviction, 13. *Conviction*, III. 1.
- II. See also *Warrant*.

## COMMON.

- I. Obstruction.
  1. By building a house, 757. *Nuisance*, I. 1.
  2. Abatement, 757. *Nuisance*, I. 1.
- II. Tenants in. *Tenant in Common*.

## COMMON COUNTS.

Plea of tender, 920. *Plea*, I.

## COMMUTATION.

Of tithes, 32, 43. *Tithe*, I. 1, 2.

## COMPENSATION.

Under treaty, for foreign confiscation, 208. *Evidence*, XIII. 1.

## COMPLAINT.

Subject matter how shown in notice of action, 1020. *Justice*, IV. 1.

## COMPOSITION.

- I. Breach by creditor: proof for full amount under bankruptcy.

To an action on a promissory note for 159*l.*, by payee against maker, defendant pleaded that W. was indebted to plaintiff in 3612*l.* 10*s.*, and was unable to pay in full; whereupon it was agreed between plaintiff, defendant and W., that plaintiff should accept a composition, to wit, 1500*l.*, in satisfaction and discharge of the 3612*l.* 10*s.*, and, in consideration of the premises, and that plaintiff would accept the 1500*l.* in satisfaction and discharge, defendant should make the note in part payment, and on account of the 1500*l.*, and that plaintiff should not enforce, or attempt to enforce, or in any way claim or demand payment of any further sum than the 1500*l.*: that defendant made the note upon the terms of the agreement, and that there never was any other consideration: that W. afterwards, and before the note was due, became bankrupt; yet plaintiff, without defendant's con-

sent, proved in the bankruptcy for the full amount of the 3612*l.* 10*s.*

*Held*, a good plea, on motion for judgment non obstante veredicto: but, *Held*, on motion for a new trial, that the plea was not proved by evidence of an agreement that, on giving 350*l.* down, 150*l.* by note, and a bond of other parties for 1000*l.*, W. should be released from the original debt. *Gillett v. Whitmarsh*, 986.

II. Variance in description of, 966. *Ante*, I.

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By foreign state, 208. *Evidence*, XIII. 1.

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By tithe commissioners, 139. *Tithe*, VI. 2.

### CONSENT RULE.

In ejectment, 934. *Baron and Feme*.

### CONSIDERATION.

I. Precedent moral consideration.

A woman declared in *assumpsit* against a man, averring that defendant had seduced and debauched plaintiff, and induced her to cohabit with him, whereby she had been injured in her character, and deprived of the means of procuring an honest livelihood; that the two had agreed to discontinue the immoral connection and live apart: and that defendant, as a compensation for the injury and in consideration of the premises, undertook to pay plaintiff a yearly sum towards her maintenance; which he had failed to do.

*Held*, a bad declaration, as disclosing no legal consideration for the undertaking. *Beaumont v. Reeve*, 483.

II. Past cohabitation, 483. *Ante*, I.

### CONSPIRACY.

Attorney convicted of, struck off the roll, 120. *Attorney*, VI. 1.

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I. Of statutes.

1. Effect of incorporation, 43. *Tithe*, I. 2. 102. *Conviction*, III. 2.

2. Construction so as to divest estate, when refused, 394. *Poor*, VI. 2.

3. General words, 452. *Rate*.

4. Application to matters ejusdem generis, 452. *Rate*.

5. Impossibility of supposed intention regarded, 689, 705. *Evidence*, VI.

6. Clause of avoidance restricted to one of several omissions, 689, 705. *Evidence*, VI.

7. Singular number construed so as to import the plural, 811. *Distress*, I. 1.

8. Liberal, 926. *Statute*, XLIII. 2.

9. So as to over-ride preceding part of section, 973. *Landlord and Tenant*, VI. 1.

10. Not so as to create a forfeiture against the intention of the parties, 973. *Landlord and Tenant*, VI. 1.

II. Of deeds.

1. Intention collected from all parts of the deed, 429. *Annuity*, I.

2. Of obscure proviso in a lease, 973. *Landlord and Tenant*, VI. 1.

III. Of pleadings.

Not forced, 757. *Nuisance*, I. 1.

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1. "Artificer" and "employer," 311. *Truck*.

2. Distinction between "assaulted" and "made an assault," 197. *Pleading*, XXVIII. 4.

3. "Boundary of any lands," 32, 40. *Tithe*, I. 1, 2.

4. "Cannot be ascertained," 547. *Poor*, XXIX. 1.

5. "On a day certain," 981. *Amendment*, I.

6. "Child," 410. *Poor*, XVI.

7. "Corporate buildings," 926. *Statute*, XLIII. 2.

8. "Demise" at a rent therein reserved, 311. *Truck*.

9. "Duly," 877. *Poor*, XXII. 2.

10. "During the voyage," 467. *Charter-party*, I.

11. "Entry" and "re-entry," 974. *Landlord and Tenant*, VI. 1.

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14. "Inquire into and settle," 43, 61. *Tithe*, I. 2.

15. "Notice thereof (with the cause of such taking) left," 1034. *Landlord and Tenant*, IX.

16. "Literature," "exclusively," 719, 729. *Poor*, VIII.

17. "Necessarily incurred," 926. *Statute*, XLIII. 2.

18. "Other tenement," 452. *Rate*.

19. "Nothing in this provision contained," 43, 56. *Tithe*, I.

20. "Put out," 757. *Nuisance*, I. 1.

21. "Removed," 757. *Nuisance*, I. 1.

22. "Shall and may and they are hereby empowered," 394. *Poor*, VI. 2.

23. "Sole and exclusive" when not equivalent to "several," 1000. **FISHERY**, I. 1.  
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**XII. Breach.**

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 2. By assigning estate to another person.

Plaintiff declared upon a contract by defendant, then holding land for a term of years to assign all his interest to plaintiff on payment, by plaintiff, within seven years from a day named, of 140*l*. Breach that, before the seven years had expired, defendant assigned all his interest to a stranger. On special demurrer, *Held* :

1. That it was not necessary that the declaration should aver tender of money, or request, by plaintiff, or plaintiff's readiness to accept an assignment.

2. That the breach, as laid, was a good ground of action, the defendant having incapacitated himself from performing the contract, if called on.

By writing not under seal, reciting that D. had purchased, for the residue of a term, four messuages, in one of which the plaintiff resided, it was agreed that plaintiff should continue to reside in that messuage during the residue of D.'s interest, if plaintiff should so long live, at the yearly rent of 1*s.*, and D. further agreed to assign all his interest in the said premises, purchased by D. as aforesaid, to plaintiff, on payment of 140*l*. within a stated period.

*Held*, 1. That this was a lease.

2. That it was also an agreement, and required an agreement as well as a lease stamp, inasmuch as the lease and the agreement comprehended distinct subject matters. *Javelock v. Franklyn*, 371.

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## CONVERSION.

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When complete as against party conveying, 689. *Evidence*, VI.

## CONVICTION.

## I. Information.

When it must be in name of attorney or solicitor-general, 102. *Post*, III. 2.

## II. Penalty.

Adjudication of in statutory form, 102. *Post*, III. 2.

## III. Form.

## 1. In words of statute, when sufficient.

Stat. 4 G. 4, c. 95, s. 30, enacts that, if any collector of tolls "shall demand and take a greater or less toll from any person than he shall be authorized to do by virtue of the powers of any act, or of the orders and resolutions of the trustees or commissioners made in pursuance thereof," he shall be liable to a penalty; which is made recoverable by conviction before justices, and distress, and imprisonment in default of sufficient distress.

A conviction stated that a collector "*did demand and take*" from J. L., at a gate on a turnpike road, "a certain toll, to wit, *the toll or sum of 4d.*, as and for a toll then and there payable by the said J. L., at such gate for a certain horse then and there drawing a certain cart upon two wheels only, and which said cart was then and there drawn by such one horse only, and driven by him the said J. L., in, along, and over the said turnpike road; and for which said horse, drawing such cart, a certain toll, to wit, the sum of 6d., was then and there payable by the said J. L., *the said toll or sum of 4d.*, so demanded and taken by the said" collector "as aforesaid, then and there being *a less toll than he*" "*was then and there authorized to take for the cause aforesaid by virtue of the powers of any act or of the orders and resolutions of the trustees or commissioners of the said turnpike road, made in pursuance thereof, contrary to the form of the statute,*" &c.

*Held*, a sufficient conviction, though no provisions of any particular turnpike act, or orders or resolutions of trustees or commissioners, were set forth or referred to.

A warrant of commitment on this conviction, for want of sufficient distress, stated that the collector was convicted, for that he "*did suffer and permit J. L. to pass through*" the turnpike gate, "with a cart drawn by one horse, on payment of the sum of 4d., as toll for the said cart drawn by one horse, *the legal toll due and payable* in respect of the said cart drawn by one horse, *being the sum of 6d.*, contrary to the statute," &c.

*Semble*, that the warrant gave a sufficient description of the offence under the statute. But *held*, that supposing it insufficient, the conviction would cure the defect.

Sect. 147 of stat. 3 G. 4, c. 126, enacts "that if any action or suit shall be commenced against any person or persons for any thing done in pursuance of this act," "if the matter or thing complained of shall appear to have been done under the authority and in execution of this act," "the jury shall find for the defendant."

*Quere*, whether justices committing by virtue of this act, and sued in trespass, be entitled to a verdict on the ground, only, that they bona fide believed themselves to be putting the act in execution. *Stamp v. Sweetland*, 13.

## 2. In statutory form, when sufficient.

Stat. 2 & 3 Vict. c. 12, s. 4, which forbids the instituting any prosecution for offences under that act except in the name of the Attorney or Solicitor-General, applies only to offences created by the act itself, though by sect. 6 it is to be construed as one act with stat. 39 G. 3, c. 79, which creates other offences.

Where a statute gives a form of conviction, not fully describing the offence, the conviction, nevertheless, must fully describe it: but in the part which awards the penalty it is sufficient to follow the statute form: Although the enacting part of the statute gives part of the penalty to the informer, and the form is not so drawn as to show who he is. *Regina v. Johnson*, 102.

3. As to showing on the face of the conviction who the informer is, 102. *Ante*, 2.

4. General negative when sufficient, 13. *Ante*, 1.

## IV. Commitment.

Bad, supported by good conviction, 13. *Ante*, III. 1.

## COPY.

I. Of rate, 707. *Poon*, IX.

II. Objections to sufficiency of. *Poon*, XXII.

## COPYHOLD.

Admittance: number of fees, and stamps.

Copyhold land was devised to A. for life remainder to five persons, as tenants in common; A. was admitted. After his death the five, having contracted to sell to B., severally surrendered to the use of B. in fee, which surrender was accepted by the lord. *Held* that B., on claiming admittance, must pay five fees, and that the admittance would require five stamps. *Regina v. Eton College*, 526.

## CORN.

Duties: damages for illegal detention for duties.

Stat. 9 G. 4, c. 60, repealing certain acts which laid duties on foreign corn imported for consumption in the United Kingdom, imposed new duties, to be graduated according to the average price of British corn, which average was to be certified by the comptroller of customs, who, for that purpose, was to strike a six weeks' average on the prices for the last week, as ascertained from returns for that week transmitted to him, and the averages certified by him in the five preceding weeks.

The Customs' Act, 3 & 4 W. 4, c. 56, in the table of duties inwards, has the words "Corn. See 9 G. 4, c. 60."

Stat. 5 & 6 Vict. c. 14, repeals stat. 9 G. 4, c. 60, (except as to the repeal of former acts,) and enacts that there shall be levied and paid, from and after the passing of stat. 5 & 6 Vict. c. 14, the duties on corn specified in the table annexed. The table graduates the duties according to the average price "made up and published in the manner required by law." Sect. 28 enacts that the comptroller shall strike a six weeks' average, from the prices transmitted to him for the last week and his last five averages, and shall on every Thursday transmit a certificate of the average so struck to the collectors at the ports; and the duties to be paid shall be regulated by the last of such certificates received by the collector. Sect. 30 authorizes the comptroller, till there shall have been a sufficient number of weekly returns under the act, to use his own weekly averages published before the act passed.

*Held*, by the Court of Exchequer Chamber, reversing the judgment of the Court of Q. B.:

That stat. 9 G. 4, c. 60, was not kept alive by stat. 3 & 4 W. 4 c. 56, for the purpose of striking the first average under stat. 5 & 6 Vict. c. 14, but was absolutely repealed by stat. 5 & 6 Vict. c. 14; and that, therefore, no duties were payable upon corn imported between the passing of stat. 5 & 6 Vict. c. 14, and receipt by the collector of the comptroller's first certificate under the last-mentioned statute.

*Held*, also, by the Court of Exchequer Chamber:

That the collector was liable, under stat. 3 & 4 W. 4, c. 52, s. 18, to an action on the case by the importer for not signing the bill of entry for such corn until he received a certain sum which he claimed as duty. And

That, the corn having been delivered up to the importer on his paying, under protest, the sum claimed as duty, the measure of damages was the amount so paid, together with the loss sustained by the detention of the corn, taking into account a fall of

prices which had occurred between the refusal to sign and the delivering up of the corn. *Barrow v. Arnaud*, 595.

## CORONER.

### I. Inquisition: insensible.

#### 1. When quashed.

A coroner's inquisition touching the death of V., found, as to the cause of death, that "a certain locomotive steam-engine numbered 48, with a certain tender attached thereto, and worked therewith, and also with divers, to wit, three carriages, used for the conveyance of passengers for hire, on a certain railroad or tram-way called 'The Midland Railways' there situate, and which said carriages respectively were then and there attached and fastened together, and to the said tender, and were then and there propelled by the said locomotive steam-engine, and which said locomotive steam-engine, tender and carriages were then and there moving and travelling along the said railroad or tram-way towards the town and county of the town of Nottingham: And the jurors aforesaid, upon their oaths aforesaid, do further say that, whilst and during the time that the same locomotive," &c., averring a collision with a train in which V. was travelling, and ascribing his death to the collision, but not so as to be intelligible without the earlier part of the finding.

The court quashed the inquisition, holding that the words "and which said locomotive engine, tender and carriages," could not be rejected as surplusage for the purpose of rendering the previous words sensible. *Regina v. Midland Railway Company*, 587.

#### 2. Rejection of surplusage, when refused, 587. Ante, 1.

### II. Proof of proceedings before, 508. ADDITION.

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### I. What acts must be under seal, 326, 810. POOR, II. 1, III. 3; 926. STATUTE, XLIII. 2.

### II. Particular corporations.

#### 2. Board of guardians, 327. POOR, II. 1.

#### 2. Municipal. MUNICIPAL CORPORATIONS.

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For breach of ecclesiastical discipline, 640. CHURCH, I. 1.

## COSTS.

### I. Directions to taxing officers, 629.

### II. See also EXPENSES.

## COUNSEL.

### Right to begin.

To a declaration in trespass defendant pleaded a justification, setting up an affirmative right in himself, which right the

replication traversed. At the trial, the plaintiff's counsel claimed the right to begin. The judge asked whether he would undertake to proceed for substantial damages, and, on counsel declining so to undertake, allowed the defendant to begin.

*Held correct. Chapman v. Rawson, 673.*

#### COUNT.

- I. Different counts, 844, 851. **DEFAMATION**, IV.
- II. Striking out, 524. **APPLICATION**, I. 2.

#### COUNTY.

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#### COURT.

- I. Full court.  
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- II. Particular courts.
  1. Ecclesiastical. **ECCLESIASTICAL COURT**.
  2. Of attachments, 981. **AMENDMENT**, I.
  3. Of the Chief Justice in Eyre, 981. **AMENDMENT**, I.

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- I. That assignee may recover premiums paid by him for assignor, 863. **DEBT**, II.
- II. Action on breach.  
Debt for money paid, 863. **DEBT**, II.

#### COVERTURE.

**BARON AND FEME.**

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- I. Assignment of debt by, 1. **BANKRUPT**, III.
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- I. Indictable offence, 883. **ATTORNEY**, V.
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- I. Amendment, 981. **AMENDMENT**, I.
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- II. Damages for illegal detention of goods, 595 **CORN**.
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#### DAMAGES.

- I. Nominal or substantial.  
Right to begin, how affected, 673. **COUNSEL**.
- II. Special damage.  
In trover, damages may be given in respect of special damage, besides the value of the goods converted, if special damage be laid in the declaration.  
As when, in trover for carpenters' tools, special damage was laid in respect of the plaintiff, a carpenter being hindered from working. *Bodley v. Reynolds, 779.*
- III. Measure of.
  1. In case for illegal distress. *Wilson v. Nightingale, 1035, n.*
  2. For illegal detention of goods, 595. **CORN**.
- IV. Assessed generally.  
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Of check, 675. **BILLS**, V. 1.

#### DEATH.

Disposition after, in power of attorney, 714. **WILL**, I.

#### DEBT.

- I. Dealings with respect to.
  1. Assignment of. **ASSIGNMENT**.
  2. Composition, 966. **COMPOSITION**, I.
  3. Presumption against payment, 115. **INTEREST**, II. 1.
- II. Action of; on covenant to pay money.  
Money paid to defendant's use.  
Defendant, to secure a debt owing from him to plaintiffs, assigned to them a policy of insurance on his life, and covenanted by the deed of assignment that he would pay the annual premium, stated to be 37*l.* 15*s.*, and that, if he at any time made default, the plaintiffs might pay it and recover the amount in an action at law as for money paid to his use. Plaintiffs declared against

defendant in debt, reciting the deed and alleging payment by them of a premium on default made by defendant, whereby an action had accrued to plaintiffs, &c.

*Held*, on special demurrer, that the count was good, though the deed contained no express covenant that the defendant should, in any stated event, pay the amount of the premium to the plaintiffs. *Barber v. Butcher*, 863.

### III. Common counts.

Part tender pleaded to all the counts, proved as to one, 920. *PLEA*, I.

### IV. Whether petition of right maintainable for, 208. *EVIDENCE*, XIII. 1.

## DEBTOR.

### Insolvent. *INSOLVENT DEBTOR*.

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### I. Formal parts.

1. Recital of the writ. *Holford v. Bailey*, 1000.
2. Charge vi et armis. *Holford v. Bailey*, 1000.
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2. Setting out incorporated matter verbatim, 823. *DEFAMATION*, I.
3. Special damages, 779. *DAMAGES*, II.

### III. Different counts.

What separate allegations do not constitute, 841, 881. *DEFAMATION*, IV. 1, 2.

### IV. What is a count in trespass, 1000. *FISHERY*, I. 1.

### V. In particular instances.

1. Against attorney for insufficient investigation of securities, 342. *ATTORNEY*, VII. 1.
2. On breach of promise to marry, 358. *MARRIAGE*, I. 1.
3. On breach of contract to assign, 371. *CONTRACT*, XII. 2.
4. On demise of turnpike tolls, 169. *TURNPIKE*, I.
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Dismissal of summons, 524. *APPLICATION*, I. 2.

### VII. How far affected by plea.

1. How far narrowed by plea, 174, 187. *PLEADING*, XXVIII. 1, 2.
2. Common counts: tender, 920. *PLEA*, I.

### VIII. In inferior court.

Jurisdiction how shown.

A declaration in debt, in an inferior court (of the borough of L.), alleged that defendant, at L., within the jurisdiction of the court, was indebted to plaintiff in 10*l*. for money

found to be due on an account then stated between them, to be then and there paid on request; with non-payment and a refusal, to wit, at L. aforesaid, within the jurisdiction; to the damage of plaintiff within the jurisdiction. The marginal venue was laid at L.

*Held* bad, after the verdict, for not showing that the cause of action arose within the jurisdiction. *Cook v. M'Pherson*, 1030.

### IX. In evidence, 208. *EVIDENCE*, XIII. 1.

## DECREE.

Of French national assembly, 208. *EVIDENCE*, XIII. 1.

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### I. When necessary, 757. *NUISANCE*, I. 1.

### II. Stamp.

Is no part of the instrument, 877. *POOR*, XXII. 2.

### III. When it may operate as a will, 714. *WILL*, I.

### IV. Construed by collecting intention from all parts of it, 429. *ANNUITY*, I.

### V. Old: proper custody, 158. *EVIDENCE*, VII.

### VI. Evidence of official character of parties, 169. *TURNPIKE*, I.

## DEFAMATION.

### I. What words actionable.

The words must be in themselves applicable to the individual plaintiff.

1. In an action for libel or slander, when the words, written or spoken, are not in themselves applicable to the individual plaintiff, no introductory averment or innuendo can give such an application.

Therefore, where the declaration in the first count, after reciting that plaintiff was employed in supplying fresh water to ships at H., and had, for that purpose, fitted up a schooner with wooden tanks, and that, the ship M. being at H., plaintiff conveyed fresh water to the M. in the wooden tanks of his schooner, complained that defendant published, of and concerning plaintiff in his said employment, and concerning the water so supplied to the M., a statement (set forth in the count) that persons on board the M. had become ill soon after leaving H., where they had taken in fresh water; which illness was occasioned by the water; that the water was run into a copper tank whence the casks were filled alongside; that the poison was imbibed from the tank; and that it behoved the authorities to order its removal, and replace it with an iron one: thereby meaning that plaintiff had been guilty of supplying bad and unwholesome water to the M.: judgment on that count was arrested.

2. Where a declaration for libel sets out a publication which refers to a previous publication, but, unless by reference to the language of the previous publication, contains no libel, such previous publication must be considered as incorporated in the publication complained of, and must appear, in the declaration, to be set out verbatim, and not merely in substance.

Therefore judgment was arrested as to the second count of the above declaration which, after reciting that defendant published a statement "in substance as follows," setting out the publication charged in the first count, charged that defendant afterwards published, of and concerning plaintiff, &c., and of and concerning the first publication, a statement that the copper tank was fitted up in a schooner belonging to plaintiff. *Solomon v. Lawson*, 823.

## II. Libel.

1. Addition of comments, 533. Post, V. 1.
2. Authority to publish, 533. Post, V. 1.
3. Imputation not new, 533. Post, V. 1.

## III. Slander.

1. Distinction between words spoken all at one time, and words spoken at different times, 841, 854. Post, IV. 1, 2.
2. What words impute a receiving of stolen goods knowing them to have been stolen, 854. Post, IV. 2.

## IV. Pleading: declaration.

1. Separate allegations of distinct words, when not different counts.

Where a declaration in slander sets out words alleged to have been uttered, some in one discourse, and the remainder in a second discourse, and there are in form but two counts, each containing only the words alleged to have been uttered in one discourse, the declaration will be treated as containing only two counts, though each of such two counts contains separate allegations of the uttering of different words in the particular discourse.

Therefore, if in each count there be any words set out which are slanderous, judgment for plaintiff will not be arrested after verdict, though the damages be general, and some of the separate allegations recite only words not actionable.

The first count stated that plaintiff was a butcher, and that defendant, contriving to cause it to be believed that plaintiff had been and was guilty of, in her said trade, fraudulently using two weights to a steelyard (as to which there was no previous direct allegation) by her used in her said trade, and of using improper and fraudulent weights in her said trade, and thereby to injure plaintiff in her said trade, in a discourse of and concerning plaintiff in her said trade, and of and concerning M., a son of plaintiff and her servant in her said trade,

as such servant, and of and concerning plaintiff having, as supposed by defendant, by M. as her agent and servant, "used improper and fraudulent weights" in her said trade, and defrauded and cheated in her said trade, and of and concerning her being, as supposed by defendant, guilty of defrauding and cheating in her said trade, and having, as supposed by defendant, in her said trade, by M. as her agent and servant, fraudulently used two weights to a steelyard by her used in her said trade, spoke, in the presence, &c., of and concerning plaintiff in her said trade, and of and concerning M., as and then being such servant, and of and concerning plaintiff having, as supposed by defendant, by M., as her agent and servant, used improper and fraudulent weights in her trade, and being, as supposed by defendant, guilty of defrauding and cheating in her said trade, and of and concerning plaintiff having, as supposed by defendant, in her said trade, by M., as her agent and servant, fraudulently used two weights to a steelyard, by her used in her said trade, these false, &c. words: *M.* (meaning the said M., so being such servant) *uses two balls to his mother's steelyard* (meaning that plaintiff, by M. as her agent and servant, used improper and fraudulent weights in her said trade, and defrauded and cheated in her said trade.) On motion to arrest judgment,

*Held* that, the words being susceptible of both a harmless and an injurious meaning, the innuendo was properly applied to point to the injurious meaning.

The second count, with similar preliminary averments and description of the intention of defendant and subject of the discourse and of the words, adding that the discourse and words were also of and concerning defendant himself, alleged that defendant, in the presence, &c., spoke, in answer to a question put by plaintiff to defendant as to whether defendant had said to G. that plaintiff's son used two balls to plaintiff's steelyard, these false, &c. words: *To be sure I* (meaning defendant) *did*, (meaning that defendant had said to G. that plaintiff's son used two balls to plaintiff's steelyard, and also that plaintiff, in her said trade, had, by a son of plaintiff, as her agent and servant, fraudulently used two weights to a steelyard by her used in her said trade;) *I* (meaning defendant) *will swear to it in any court; you, G., have used them for years* (meaning that plaintiff had in her said trade fraudulently used two weights to a steelyard by her used in her said trade.) On motion to arrest judgment,

*Held* that the words, as stated and explained, were actionable. *Griffiths v. Lewis*, 841.



2. Words appearing to be used in one continued discourse constitute only one count.

Declaration for slander recited that plaintiff carried on the trade of buying and selling, and was a dealer in an article of fishing tackle called a winch; and that defendant used the trade of making and selling winches: and it charged that defendant, contriving to injure plaintiff in his said trade, and to cause his customers to believe that he was guilty of unlawfully buying goods well knowing them to have been stolen and dishonestly come by, in a discourse which he had with plaintiff, of and concerning him with reference to his said trade, and of and concerning the premises, in the presence and hearing of J. F., &c., falsely and maliciously spoke, to and of and concerning plaintiff, and of and concerning him with reference to his said trade and the premises, the words, &c.: "I" (meaning defendant) "have been robbed of about three dozen winches" (meaning such articles, &c.): "a person has been buying things at my shop, and has taken them; you" (meaning plaintiff) "have bought two, one at 3s. and one at 2s.: you" (meaning plaintiff) "knew well, when you bought them" (meaning the said winches,) "that they cost me" (meaning defendant) "three times as much making as you" (meaning plaintiff) "gave for them, and that they could not have been come honestly by." The declaration then proceeded: "whereupon the plaintiff then, in the presence and hearing of the aforesaid persons, said to the defendant," &c., setting forth further words of plaintiff respecting winches, and alleging that defendant, further contriving, &c., thereupon, in the presence and hearing of the said persons, replied, &c. (setting out other words.) "Thereby meaning," &c. "that the plaintiff had been and was guilty of buying winches, well knowing the same to have been dishonestly come by and to have been feloniously stolen by the person of and from whom the said plaintiff had so bought them."

After verdict for general damages: *Held*, on motion in arrest of judgment,

1. That the words first set out imputed that plaintiff had received stolen goods knowing them to have been stolen.

2. That the words following appeared to be spoken at the same time with the others, and formed with them a continued discourse; that the declaration, therefore, contained only a single count; and, consequently, that plaintiff was entitled to judgment, even on the assumption that the words last set out gave no cause of action. *Alfred v. Farlow*, 854.

3. Preliminary averments, when not necessary, 841. Ante, 1.

4. Innuendo, when it does not enlarge the colloquium, 841. Ante, 1.

5. Innuendo, pointing to injurious meaning of words, susceptible of a harmless meaning, 841. Ante, 1.

6. Colloquium, effect of in explanation, 841. Ante, 1.

7. Incorporated slander, when it must be set out verbatim, 823. Ante, 1.

8. Averments and innuendoes, when useless, 823. Ante, 1.

#### V. Evidence.

1. Of authority to publish libel.

Indictment for causing to be published in a newspaper a libel on K. The libel told a story of K., and added comments on the story, giving it a ridiculous character.

The editor of the paper deposed that defendant asked him to show K. up, and communicated the story, which the editor told to a reporter for the paper; and that this story was, substantially, what was published: that before the publication appeared, defendant remarked on the delay: and that, after the article came out, defendant expressed his approbation of it.

*Held* that, on this evidence a jury might find that the defendant authorized the publication of the particular libel, notwithstanding the comments added, and although it appeared that the editor had heard the story before defendant told it to him. *Regina v. Cooper*, 553.

2. Proof of inducement, 508. ADDITION.

#### DEFAULT.

- I. Mortgagee's right of entry before, 895. MORTGAGE, III. 2.

- II. Negligent. NEGLIGENCE.

#### DEFENDANT.

- In misdemeanor, payment of fees by, 75. CLERK OF THE PEACE, I.

#### DE INJURIA.

- I. To matters of excuse: custom.

Replevin for taking cattle. Plea that W. was seised in fee of a forest, within which there were wastes; and that certain tenants of lands near the forest had a right of common on such wastes for their cattle levant and couchant; that there was a custom within the forest for the master forester to make drifts annually of the cattle depasturing the wastes, which were to be driven to a place named to ascertain whether any of them were unlicensed cattle and whether any commoner had surcharged; and, if any had surcharged, the cattle were to be impounded damage feasant. That plaintiff was a commoner; and defendant, making the drift as servant of the master forester, found plaintiff's cattle depasturing and doing



damage in the place in which, &c., and that plaintiff had surcharged by depasturing with the cattle seised: wherefore defendant detained the cattle to impound them.

Replication, admitting W.'s seisin and the existence of the wastes, *De injuriâ absque residuo*, &c. *Held* good on special demurrer. *Mortimer v. Moore*, 294.

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Page 640. **CHURCH**, I. 1.

#### DISTRESS.

I. Feeding of animals impounded.

1. Sale for expenses.

Under stat. 5 & 6 W. 4, c. 59, s. 4, requiring the distrainer of any horse (which word "horse" may, by sect. 21, be construed as "horses") to feed it while in the pound, and empowering him, after seven days, to sell any such horse for the expenses; a party distraining several horses may sell one or more for the expenses of all. *Semble*, per Coleridge, J., that he may repeat such sale from time to time as need requires.

But, if he pleads the sale in an action of trespass for taking and converting the horses sold, he must allege that it was necessary to sell them for payment of the expenses.

And where defendant had obtained a verdict on such plea not containing the above allegation, judgment was given non obstante veredicto. *Layton v. Hurry*, 811.

2. Pleading, 811. *Ante*, I.

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**VI. Documentary: inspection.**

Of entry in bank books.

Plaintiff, having been a holder of  $3\frac{1}{2}$  per cent. stock, brought an action against the Bank of England for refusing to pay the dividends. The defendants pleaded, denying that plaintiff was proprietor of the stock in manner and form, &c.: and their defence in fact was that, before the dividends became due, the stock had been transferred out of plaintiff's name. Issue being joined, and notice of trial given,

The court, on motion, made an order that the plaintiff should be at liberty to inspect that particular entry, in the transfer book at the Bank, which related to the transfer of the stock in question; but not any other part of the Bank books.

A party having executed a transfer of stock in the form prescribed by stat. 11 G. 4 & 1 W. 4, c. 13, s. 13, cannot, in an action against the Bank, dispute the title of the transferee on the ground that he has not subscribed an acceptance of the transfer as directed by that clause. *Foster v. Bank of England*, 689.

**VII. Documentary: proper custody.**

Of attorney virtually for both parties.

A deed more than thirty years old, creating a term which attended the inheritance, was produced from the custody of the plaintiff's attorney. Plaintiff was administrator to the trustee of the term. There was evidence that the attorney had acted for the family of the defendants, who were beneficially interested in the premises to which the deed related, and it was not shown for whom the attorney held the deeds.

*Held*, that there was sufficient *prima facie* evidence of proper custody. *Doe dem. Jacobs v. Phillips*, 158.

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1. As evidence of the preliminary proceedings recited therein, 161. *LANDLORD AND TENANT*, X. 1.

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When not proof of an order, 161. *LANDLORD AND TENANT*, X. 1.

**XII. Judicial documents: records by justices, as evidence of proceedings therein recited, 161. *LANDLORD AND TENANT*, X. 1.**

**XIII. Depositions: taken under bill to perpetuate testimony.**

1. A party claiming to have been the owner of lands, by virtue of a cession to him from A., since deceased, offered evidence, before any other proof of the cession, that A. actually managed the property, and, while so managing, declared that he did so in the name of the now claimant. *Held*, (p. 243, &c.,) admissible evidence.

On petition of right, a commission issued, and an inquisition was thereupon found and returned into Chancery. Before any further proceeding, the suppliant filed a bill against the Attorney-General to perpetuate testimony, reciting the petition. A commission to examine witnesses issued thereupon. The suppliant proposed to the crown to join in the commission: but the crown did not consent; and the commission issued *ex parte*. The crown having traversed the inquisition, and the record being sent into this court: *Held*, (p. 244, &c.,) that depositions taken under the commission to examine witnesses were admissible evidence on behalf of the suppliant, where the deponents were without the jurisdiction of the court.

Evidence being offered to prove the law of inheritance at a particular time in Alsace, one of the witnesses called for that purpose, a French lawyer practising in Alsace, stated on cross-examination that the feudal law had been put an end to in Alsace, *de facto*, "by the torrent of the French Revolution," and that there was a decree of the French National Assembly to that effect, of 4th August, 1789; and he said that he had learned this fact in the course of his legal studies. *Held* (p. 246, &c.,) admissible evidence, though no other proof was given of the contents of the decree. *Per Lord Denman, C. J., Williams and Coleridge, Js. Dissentiente Patteson, J.*

B. presented a petition of right to the queen, claiming certain money of the crown upon the facts therein stated, and praying that the crown would order right to be done, that the royal declaration should be endorsed on the petition to that effect, the petition referred to the Court of Chancery and duly received and enrolled, and the Attorney-General required to answer it, and that the suppliant might prosecute his complaint against him and such other persons as need might require, and have leave

to make him and them parties, and pray to obtain relief. The queen referred the petition to the Court of Chancery; and the Chancellor endorsed "Let right be done:" and thereupon that court, by letters patent, appointed W. and others to inquire, upon the oath of jurors, of the truth of the matters in that petition: W., &c. returned into the Court of Chancery an inquisition taken accordingly; and finding.

That B. was the eldest son of a nobleman who married an English woman in England, and that the father was born in Germany, and B. in England. That, before and since the peace of Westphalia, the lordship and land of Sultz, in Lower Alsace, was an ancient fief descendible in the male line. That in 1786, the line of feudatories having failed, it belonged to the Archbishop of Cologne to appoint a new line of feudatories; and that he nominated the father of B., who was invested.

That, before the treaty of Munster, Lower Alsace formed part of the Empire of Germany. That, by that treaty, the Emperor of Germany ceded to the King of France all his rights and those of the Empire in Lower Alsace, subject to a proviso that France should leave the then feudatories of Sultz in the liberty and possession they had heretofore enjoyed as immediately dependent upon the Empire. That the treaty was ratified by subsequent treaties, the last named being that of Versailles between England and France in 1783.

That, in 1791, B.'s father ceded his rights to B., who was then fourteen years old.

That, in 1793, B. and his father left Sultz, and took refuge in the Austrian army. That afterwards, in the same year, it was, by the French Department of the Lower Rhine (in which Sultz was) decreed that B. and his father should be declared emigrants, and all their property confiscated, in order to its being sold or alienated, agreeably to the laws relating to emigrants. That, in pursuance of the decree, the lordship and lands of Sultz were seized as confiscated by the persons then exercising the powers of government in France, and were thenceforward treated as national property, and part thereof was sold under the authority of the French government, and the residue continued in the possession of that government until after the restoration of the house of Bourbon in 1814 and 1815.

That, by the treaty of Paris between Great Britain and France, 1814, it was stipulated that commissioners should examine the claims of his Britannic majesty's subjects upon the French government for the value of movable or immovable property unduly (*indûment*) confiscated by

the French authorities, loss of debts, or other property unduly detained under sequestration, since 1792. That, by the treaty of Paris between Great Britain and France, 20th November, 1815, incorporating a Convention of that date, it was provided that British subjects having claims against the French government, who had, in contravention of the after-mentioned treaty of commerce, and since 1st January, 1793, suffered in consequence of confiscation or sequestration decreed in France, and their heirs and assigns, subjects of his Britannic majesty, should, conformably to the treaty of 1814, be indemnified and paid, after their claims should have been recognised as legitimate, and the amount fixed, as after expressed: namely, that the claims of such subjects arising from laws made by the French government or any other claim whatsoever (with an exception not comprising B.'s case) should be liquidated and fixed, and a sum be inscribed in the great book of the public debt of France, as a guarantee for the claimants, and further sums be furnished if necessary: three calendar months to be allowed to claimants resident in Europe to present their claims; and those of British subjects to be examined according to a mode directed. That, by the treaty of commerce of 1786, in case of rupture between England and France, the subjects of either residing in the territory of the other were to be allowed to continue residence undisturbed while they conducted themselves legally, and, if ordered to withdraw, should have twelve months to do so, with their property, if they did not conduct themselves contrary to public order.

That, in December, 1815, M. and others were appointed, under the great seal, commissioners of liquidation, arbitration and deposit, to execute the convention. That, on 12th January, 1816, B. transmitted his claim to the Prime Minister of France, who received it on 9th February, 1816, but stated that he considered it inadmissible.

That, by a Convention between Great Britain and France, April, 1818, it was agreed that, to effect payment of capital and interest due to British subjects, which had been claimed under the Convention of 1815, an annuity of three millions of francs should be inscribed in the great book of the public debt of France.

That, by stat. 59 G. 3, c. 31, reciting that the commissioners had registered the claimants who presented themselves within the period prescribed in the Convention of 1815, and had paid certain sums, and that three of the said commissioners, by commission under the great seal dated 1818, had been appointed commissioners

of liquidation, arbitration, and award, to act on behalf of his majesty in England, to consider the claims of British subjects properly presented, and the remaining commissioners had been appointed commissioners of deposit to receive the inscriptions from the French government; it was enacted that the commissioners of liquidation should apportion and distribute the sums provided by France, and order them to be paid to the claimants who had duly registered, in full if the sums paid were sufficient, in part if insufficient: the rejection of claims, subject to appeal to the privy council, to be final, and a discharge of both governments in respect of any registered claim; that unappropriated sums inscribed in the great book of France might, by the commissioners of deposit, on receiving directions from the English Secretary of State for Foreign Affairs or the Commissioners of the Treasury, be sold, and the proceeds transferred to the commissioners of liquidation, to be invested in public securities, for the purpose of being applied to liquidate claims, or, if all were liquidated, to such purposes as the Commissioners of the Treasury should direct; and that the public securities should be deposited in the Bank of England in the names of the commissioners of liquidation, and the produce paid for the purposes in the act specified.

That B.'s name and claim were not registered till after the passing of the statute.

That, after all the registered claimants were paid, a surplus of 482,000*l.* had remained with the commissioners of deposit, of which 200,000*l.* had been applied to satisfy claims tendered after the time mentioned in the Convention of 1815, and admitted under the authority of the Commissioners of the Treasury given in May, 1826; and the residue was paid into the bank on the government account by direction of the Treasury under stat. 59 G. 3, c. 31.

That B.'s property, lost as above with interest, was of the value of 364,000*l.*

The Attorney-General having traversed the matters of the inquisition, and a verdict on the traverse being found for B.:

*Held* (on cross motions, to enter the verdict for the suppliant, and to enter judgment for the crown non obstante verdicto,) That no right against the crown appeared upon the inquisition, (p. 270, &c.) For that,

Assuming (1) a petition of right to be maintainable for money claimed as debt or damages; and

Assuming (2) that B. was, for the purposes of this petition, a British subject:

First, No undue confiscation was alleged so as to satisfy the condition of the treaties

of 1814 and 1815, nothing being shown but an adjudication by a French tribunal, which this court could not see to be contrary to the law of France, or pursuant to any law which this court could pronounce void as against British subjects.

Secondly. It did not appear that B.'s claim had been admitted and ascertained according to the treaties, his name not having been registered within the period provided for by the Convention of 1815, and no order appearing to have been given by the Treasury to inquire into B.'s claim, or any request made to them for such order; and, further, it not appearing that no other claimant might possibly come in for the surplus; and the inquisition not showing whether or not any inquiry had been made by the commissioners of liquidation into the merits of B.'s claim.

Thirdly, That the queen could not be said to have received the money, the finding in the inquisition, that the surplus had been paid into the Bank of England on the government account, not shewing that the sovereign had received a personal benefit from it. *Baron de Bode's Case*, 208.

2. Identity of cause, 208. Ante, 1.

3. Identity of parties, 208. Ante, 1.

4. Opportunity to cross-examine, 208. Ante, 1.

XIV. Depositions: of witnesses without the jurisdiction, 208. Ante, XIII. 1.

XV. Documentary: inferences from formal parts.

As to place of drawing check, 675. *BILLS*, V. 1.

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XVIII. Secondary.

Not from presumption, without search, 576. Post, XIX. 1.

XIX. Presumption: from possession.

1. What link in title it does not supply.

On the trial of an ejectment, the lessor of the plaintiff claimed as assignee of a term of 999 years, which was traced from J.

A conveyance was proved, by which M. assigned the term to J. more than fifty years before the trial; and J. was shown to have had possession thenceforward; and it was proved that possession had been in parties claiming through J. down to a time within a few years of the trial.

It also appeared that, before the conveyance to J., W. had released the term to M., by a deed reciting the will of E., a



party entitled to the term, under which W. and M. each asserted an interest. Probate of the will was not put in; and no proof was given of search for it. It did not appear that W. was not the party entitled to the term, in case of the intestacy of E.

*Held,*

(1.) That a jury were not entitled to presume that probate of such will as was recited in the deed of release had been granted: And therefore that the title to the term was not traced from W. to M.

(2.) That upon showing cause against a rule for a new trial, after a verdict for the lessor of the plaintiff, it was not competent to him to abandon his claim of the term, and insist that, independently of the will, the jury might presume an estate in fee from the possession. *Doe dem. Woodhouse v. Powell*, 576.

2. From user more extensive than old lease.

Declaration for obstructing a wharf of which plaintiff was possessed; plea, traversing such possession: issue thereon.

Plaintiff having proved sixty years general user, defendant proved that, thirty years before the trial, the parties through whom plaintiff claimed had accepted a lease of adjoining land, containing a grant of the use of the land in question, as the same had been theretofore used by the lessees as a sawpit and for laying timber.

*Held*, that the jury might nevertheless, from the general user, infer that plaintiff was possessed of the land absolutely at the time referred to in the pleadings. *Page v. Hatchett*, 593.

XX. By proof of exercise of office.

1. Inference upwards.

The fact, that a party did a particular act (as signing a land-tax assessment) in an official capacity, may be proved, not only by showing that he exercised the office before or at the period in question, but also by evidence (limited to a reasonable time) of his having exercised it afterwards. *Doe dem. Hopley v. Young*, 63.

2. In ejectment in demise of parish officer, 1037. *POOR*, VI. 5.

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## EXECUTION.

I. Immediate.

Since the general rule, *Trin. 4 Vict.*, when a judge certifies, under stat. 1 W. 4, c. 7, s. 2, for immediate execution, the plaintiff may sign judgment and take out execution, not only without a four day rule, but without delay. *Alexander v. Williams*, 931.

II. Rule for.

When unnecessary, 931. *Ante*, I.

III. Writ generally.

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When not presumed, 576. *EVIDENCE* XIX. 1.

II. Pleading: set-off.

1. In action against executor.

To assumpsit against an executor, on an account stated by him as executor, a set-off



for debts due from plaintiff to testator in his lifetime may be pleaded. So held on demurrer to the replication.

The plea averred that the debt set off was equal in amount to the damages sustained by the breach of the promises. The plaintiff replied as to 1493*l.*, parcel of the set-off, the Statute of Limitations; and further replied that plaintiff was not indebted to testator, or defendant as executor, beyond the 1493*l.*, modo et formâ; with a single conclusion to the court as to the whole replication. *Held*, on demurrer, a bad conclusion.

*Quere*, whether the replication was bad for duplicity. *Blakesley v. Smallwood*, 538.

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##### 1. How described.

A declaration, reciting that defendant had been summoned to answer plaintiff in an action of trespass, charged that defendant, with force and arms, broke and entered a fishery, to wit, the sole and exclusive fishery of plaintiff, in a certain part of a river then flowing and being over the soil of one F., and then fished for fish in the said fishery of plaintiff, and the fish of the said fishery of plaintiff, there found, and being in the said fishery, chased and disturbed: Conclusion, contra pacem.

*Held*, on motion in arrest of judgment, after verdict for plaintiff:

(1.) That the declaration was shaped in trespass.

(2.) That (*Semble*) trespass lies for breaking and entering the several fishery of A. on the soil of B. But

(3.) That the words "sole and exclusive fishery" were not equivalent to "several" fishery; and that no cause for an action of trespass appeared. *Holford v. Bailey*, 1000.

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3. Trespass for breaking and entering, 1000. *Ante*, 1.

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When a chattel has been annexed by its owner to another's freehold, but may, without injury to the freehold, be severed, it is not necessarily to be inferred from the annexation that such chattel becomes the property of the freeholder. Whether, in a particular case, it has become so or not, may be a question on the evidence; and a jury may infer, from user or other circumstances, an agreement, when the chattel was annexed, that the original owner should have liberty to take it away again. *Wood v. Hewett*, 913.

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1. Maltreatment of child or lunatic by person having the custody; what must be alleged.

An indictment charged that *while* a person of unsound intellect was under the care of defendant, defendant treated such person improperly and neglectfully in certain stated particulars.

*Held* not to be a substantive charge; and judgment was arrested.

Another count charged that the same person was the illegitimate child of defendant, a female, who had means for the comfortable support and maintenance of both, whereupon it became her duty to take proper care of him; but that she did not take proper care of him, but kept and confined him in a dark, cold, and unwholesome room, neglected to provide him with proper clothing, permitted him to become dirty, allowed the room to become foul so as to cause unwholesome smells, and kept him without proper air, warmth, and exercise necessary for his health, to his damage and peril.

Judgment arrested: first, because no duty was shown; secondly, because it was not shown that the conduct of defendant had or must have occasioned actual injury. *Regina v. Pelham*, 959.

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**INSOLVENT DEBTOR.**

I. Protection from process: pleading.

To an action of debt upon simple contract, defendant pleaded in bar, under stat. 5 & 6 Vict. c. 116, s. 10, an order for protection. The plea stated only that the action was for a debt contracted before the date of filing defendant's petition for protection from process as after mentioned; that, before the commencement of the suit, he, under and by virtue of and according to the directions of the statute, presented

his petition for protection from process to the Birmingham District court of Bankruptcy; that such petition was duly presented; and that afterwards, and before the commencement, &c., a final order for protection and distribution was made by a commissioner duly authorized.

*Held*, on special demurrer, that the plea did not show enough to bring it within the requisites of the statute. *Tyler v. Shinton*, 610.

## II. Pleading.

### 1. Replication to plea of set-off.

A discharge under the Insolvent Debtor's Act cannot be given in evidence under a replication of *Nil Debt* to a plea of set-off, but must be specially replied.

*Semble*, per Patteson, J., that stat. 1 and 2 Vict. c. 110, s. 91, enabling persons sued for any debt with respect to which they are entitled to the benefit of the act to plead generally that they were duly discharged according to the act by the order of adjudication, "and that such order remains in force, without pleading any other matter specially," extends to the replication to a plea setting off any such debt. *Ford v. Dornford*, 583.

### 2. Pleading the benefit of the act, 583, 610, Ante, I. II. 1.

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## INSURANCE.

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##### 1. What is a hostile port.

Assumpsit on a policy of insurance on goods, at and from Liverpool to Lintin, Hong Kong, Macao, Canton, &c., or all or any other port or ports, place or places, in China, the East Indies, and the Indian and China seas, the Gulf of Siam or seas adjacent, particularly Manilla and Singapore, backwards and forwards, &c., *with leave to transship or reshipe* the goods on board the same or any other vessel or vessels, and from such other vessel, &c., to any other vessel, &c., at or off Singapore, Manilla, Macao, &c., or elsewhere in the Canton river, or on the coast of China, or in the China seas or Gulf of Siam, or seas adjacent, for Canton, Manilla, Singapore, or any other of the ports or places aforesaid, and with leave for the ship named, or any other vessel, &c. on board which the goods might have been transhipped, to proceed from any port, &c., in China, the China seas or seas adjacent, particularly the before-mentioned places, to any other ports or places in China, the East Indies, or the Indian or China seas or seas

adjacent, and discharge the goods at any or all of the said places, or remain at the same until it should be deemed expedient to proceed to the port or place of discharge: continuing the risk by land and water until the goods should be arrived at their final port of destination, and including all risk of boats, &c., and of transshipment as above-mentioned. Premium 5 guineas, to return 50s. per cent. if the vessel discharged at Manilla direct or at a port in China in the usual course, the port being open, or 60s. per cent. if she discharged at Singapore direct. The count alleged a loss by perils of the seas before the goods were landed at their final place of destination.

*Plea*. That the ship arrived at Hong Kong on the coast of China, and that, while she lay there, by reason that she could not safely proceed to any usual port or place of discharge in China, it was agreed by the agents of the assured that the goods should be finally discharged at Hong Kong, and thereupon they were by the said agents discharged out of the said ship into another ship, being a receiving ship appointed by them as a warehouse for receiving and storing the said goods: that Hong Kong, then and before the alleged loss, became the final place of destination, and the goods, before such loss, were finally discharged and safely landed at such final place of destination.

*Replication*: That the goods were not, before the loss, discharged and safely landed at their final place of destination, in manner and form, &c. Issue thereon.

It appeared in evidence that the ship named (the Penang) sailed on the voyage insured, and met with a storm which damaged the ship and goods, not, however, rendering the ship unseaworthy. She arrived at Macao in June, 1841. There was no market for goods at Macao. Hostilities had taken place (but without formal declaration of war) between the Chinese and the English, who, in May, had stormed Canton. Before the Penang arrived, hostilities had been suspended; but peace was not finally established till August, 1842. The English naval commander on the Canton station did not prohibit British ships from going to Canton, at their own risk; but the Chinese were so much exasperated against the English, that the consignees at Macao of the goods on board the Penang deemed it unsafe for her to go to Canton; and they chartered another ship for three months, to accompany the Penang to Hong Kong, (four miles from Macao,) in order that the goods might be transhipped and examined, and might be in a place of safety till they could be sent to Canton or some other market when circumstances should

permit. Hong Kong was considered a safe place for this purpose; Macao not. There was no market at Hong Kong. The consignees did not intend either to reship the goods on board the Penang, or to make Hong Kong the final place of deposit for sale. The goods, after being transhipped, were lost on board the second ship by perils of the seas.

On a special case, empowering the court to draw such inferences as a jury might,

*Held:* That (assuming that question to arise on the pleadings) Canton was not such a hostile port as, in point of law, could not be considered a possible place of final destination: that, at the time of the transshipment, other places, in China and elsewhere, might have become the place of final destination within the intention of the policy: and that the plea, stating Hong Kong to have become, before the loss, the final place of destination, was not borne out.

In assumpsit on another policy upon goods by the Penang, lost at the same time by the same perils, the policy reserving no liberty to tranship, but in other respects (so far as is material here) resembling the former, the defendants pleaded that, after the sailing, &c., the goods were, by the agents of the assured, without any cause rendering it necessary, and without defendant's consent, removed from on board the Penang, and placed on board another ship, and were continued there till the loss happened. On replication *De injuriâ*, and special case setting forth the facts above stated, with liberty to the court to draw such inferences as a jury might,

*Held*, that the facts showed a departure from the voyage insured against, and that the plaintiffs could not recover. *Oliverson v. Brightman*, 781.

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- IV. Commitment by.
  1. For what time.

A justice's warrant, committing a party in default of finding sureties to keep the peace, is bad if the commitment be for no definite time, but "until he shall find such sureties," or be discharged by due course of law.

An action lies against the justice for committing on such warrant; and *bonâ fides* is no defence.

It is not necessary that such warrant should fix the amount in which sureties are to be given.

Notice of action, for a commitment under such warrant, stated that the justice had caused the complainant to be unlawfully committed to a certain common gaol or prison in the borough of Monmouth, and there imprisoned and kept, &c., without reasonable or probable cause, from, &c., to, &c. (naming the days); and the notice went on to state that complainant would, at the expiration of one calendar month, cause a writ of summons to be sued out of the Court of Queen's Bench against the justice, at complainant's suit, for the said imprisonment, and proceed against him therefore according to law.

*Held*, a sufficient notice under stat. 24 G. 2, c. 44, s. 1, as to the place where the

cause of action arose, the subject of complaint generally, and the intended course of proceeding. *Prickett v. Gratrex*, 1020

2. For default of finding sureties to keep the peace, 1020. *Ante*, 1.

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Plurality when required, 371. **CONTRACT, XII. 2.**

## III. Continued tenancy.

Inference as to terms.



Tenant of premises at 47*l.* a year received notice to quit; and the landlord agreed with another party for a holding to commence on the expiration of the current term, at 80*l.* a year. Before the term expired, the new tenant, by consent of all parties, was admitted in place of the outgoing tenant; and the rent was paid at the rate of 47*l.* to the end of the original term. Disputes arising on the new agreement, it was abandoned; but the new tenant continued to occupy.

*Held*, that it was a question for the jury, in an action for use and occupation, what rent was fairly payable for the continued holding; no necessary inference arising, under the circumstances, from the former holding at 47*l.* *Thetford, Mayor, &c. v. Tyler*, 95.

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#### V. Fixtures.

Property in, a question of evidence, 913.  
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##### 1. How reserved.

A lease contained the following clause: "And also shall be lawful for E. D." (the lessor,) "her executors," &c., "to call on tenant for quarterly payment of rent, or, if otherwise, as now accepted, at Michaelmas and Lady Day, as a matter of favour, with a quarter remaining in hand, and, if not paid in twenty days after, rent as stated, and 10*l.* of increased rent for breaking up land by acre, then the tenant shall be liable to have the rent, &c. due recovered by sale and distress, or to enter on the premises for the same till it be fully satisfied."

*Held*:

1. That the clause might be understood as reserving a right of entry, upon non-payment of rent, to hold the premises till the arrears were paid.

2. That, under this clause, the lessor could not enter without the common law formalities, sect. 2, of stat. 4 G. 2, c. 28, applying only where there is a right of re-entry by which the lease is avoided. *Doe dem. Darke v. Bowditch*, 973.

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3. Stat. 4 G. 2, c. 28, s. 2, when it does not apply, 973. Ante, 1.

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#### VIII. Landlord's remedies; ejectment.

Notice to quit, by trustee for annuitant to grantor of annuity, 429. ANNUITY, I.

#### IX. Landlord's remedies: distress.

Notice.

Under 1 stat. 2 W. & M. c. 5, s. 2, the notice of distress for rent to be given five days before sale must be in writing. *Wilson v. Nightingale*, 1034.

#### X. Landlord's remedies: restitution of deserted premises.

##### 1. In what capacity judges of assize act.

Proceedings of magistrates for restitution of premises under sect. 16 of stat. 11 G. 2, c. 19, are, by sect. 17, to be revised (in England) by the judges, on circuit, &c., acting as individual justices.

*Held*, therefore, that the allegation in an indictment, that an order was made by A. and B., the justices of assize for Surrey, was not supported by a certificate of such an order signed by the deputy clerk of assize in the same way as an order of court.

*Semble*, that it is not necessary, on such indictment, to prove the proceedings before the magistrates, preliminary to the restitution; and that it is sufficient to put in the record made up by them, in which, after reciting the complaint and other proceedings, they declare that they put the complainant into possession.

*Semble*, that orders under s. 17 of stat. 11 G. 2, c. 19, should be signed by the judges who make them. *Regina v. Sewell*, 161.

2. Evidence of order by judges of assize 161. Ante, 1.

3. Evidence of proceedings before magistrates, 161. Ante, 1.

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#### XII. Tenant's remedies.

Trespass: not before entry, 895. MORTGAGE.

#### XIII. Pleading.

##### 1. What is an averment of tenancy.

To trespass for breaking plaintiff's close, &c., defendant pleaded that plaintiff was tenant from year to year of the locus in quo to B., the owner of the freehold, subject to a stipulation that B., or his oncoming tenant, at any time after the 1st January preceding a 6th April when plaintiff should have received notice to quit on such 6th April, should have liberty to enter and plough; that B. gave plaintiff half a year's notice to quit on a 6th April, and afterwards "agreed to let" to defendant, and defendant, "agreed to take" of B., the land, and hold the same to defendant as tenant from year to year after the expiration of plaintiff's tenancy.

and defendant "thereupon became and was the oncoming tenant of B," on the expiration of plaintiff's tenancy: and that defendant afterwards entered, between the 1st January and the said 6th April, to plough, &c. (justifying.)

*Held*, on demurrer to the replication, a good plea in bar; for that the allegation that defendant became B.'s oncoming tenant was sufficient on general demurrer, assuming that the plea showed no demise from B. to defendant, and that the contract pleaded required a written instrument (as to which assumptions *quære*).

The plaintiff, admitting that the locus in quo was B.'s freehold, replied *De injuriâ absque residuo causâ*.

*Held*, bad, on special demurrer, inasmuch as defendant in his plea derived an authority from plaintiff. *Milner v. Jordan*, 615.

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*Held*, that the agreement might be set up as a defence under a plea that the cow was not the plaintiff's. *Richards v. Symons*, 90.

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In a declaration for breach of promise to marry plaintiff within a reasonable time after request by her, if the count shows that the defendant, after promise and before action brought, married a person other than the plaintiff, request is not a necessary averment: and a plea to such count, alleging, as new matter, that request was not made, is no defence.  
The declaration; averring defendant's marriage to such other person, need not show that the person is still living.  
So held, on demurrer to a plea which stated, by way of confession and avoidance, that plaintiff did not, at any time before action brought, request defendant to marry. *Short v. Stone*, 358.
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- VI. *De non apparentibus et non existentibus eadem est ratio*, 595. **CORN.**
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2. Mortgagee's right of entry: when immediate, before default.

In trespass quare clausum fregit, the plaintiff made title under a mortgage deed of March 6th, 1840, by which the mortgagor, H., demised premises to the plaintiff from thenceforth for a certain term, subject to a proviso that the demise should cease and be void if H. paid principal and interest by March 6th, 1841, and interest at stated periods in the mean time; and to another proviso, empowering plaintiff to sell (after three months' notice,) if default should be made in payment of principal and interest at the times named. Then followed covenants (among others) by H. to plaintiff, for payment of principal and interest at the days appointed, and that, at any time after default made in such payment, it should be lawful for plaintiff peaceably and quietly to enter upon the premises, and from thenceforth, for the residue of the term, to hold the same and take the rents and profits without lawful interruption from H. or any other person, &c.

On pleadings in trespass, setting forth the deed, and showing that plaintiff had entered upon the mortgaged premises after the execution of the deed, but before March 6th, 1841, and before default in payment, and raising the question whether or not he had a right so to enter.

*Held*, that the deed gave power to the mortgagee to enter before default, and before the day named for any payment. *Rogers v. Grazebrook*, 895.

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Declaration in trespass alleged that defendant broke and entered plaintiff's dwelling-house in which he and his family were then dwelling and actually present, and, while they were therein, pulled down and demolished the same.

Plea, that defendant was entitled to common of pasture on close H. for sheep levant and couchant, &c., as appurtenant to land of which he was the occupier; and that, because the dwelling-house was wrongfully erected on the said close, so that, without breaking and entering, &c., and pulling down and demolishing, the said dwelling-house, he could not enjoy his said common, defendant broke and entered, &c., and pulled down and demolished the dwelling-house, &c., doing no unnecessary damage, &c.

Replication. That the dwelling-house, at the time when, &c., was the dwelling-house of plaintiff, and in the actual occupation of plaintiff and his family, who were actually present in, and inhabiting the same, and that defendant, at the times when, &c., *with force and arms and with a strong hand and in a violent manner* broke and entered, &c., and committed the trespasses.

*Held.* on demurrer to the replication,

1. That the replication was bad, because it did not add any thing material to the complaint in the declaration.

2. That, the house being an obstruction to defendant's enjoyment of his common, he might have justified abating so much of it as caused the obstruction, if no person had been therein.

3. But that the justification here was not maintainable, since it appeared by the pleadings that the plaintiff's family were in the house when defendant pulled it down.

4. *Quere* whether the plea was bad

because it did not aver notice to the plaintiff to abate the nuisance himself.

The second count alleged that defendant with force and arms expelled, put out and removed plaintiff and his family from the possession and occupation of plaintiff's dwelling-house, and kept them so expelled, &c. for a long time, &c.

Plea, an immemorial right of common on close H., appurtenant, &c. as above, and that, because the house was unlawfully erected on the close, so that, without pulling it down, defendant could not enjoy his common, defendant pulled down, prostrated and removed the house, and in so doing necessarily expelled, put out and removed plaintiff and his family from the possession and occupation, and kept them so expelled, &c., doing no unnecessary damage, &c.

Replication. That, before the time, &c., and before the land in the plea mentioned came to defendant, H., being seised in fee and occupier of the said land, granted license to plaintiff to fence off part of close H. and build a dwelling-house on such part: and that, before the time when, &c., plaintiff, in pursuance of such license, fenced off such part, and built thereon the dwelling-house mentioned in the 2d count, and in so doing laid out large sums of money, &c. And that, afterwards, the said land, and H.'s estate and interest therein, came to and vested in defendant, and the said land is that in respect of which defendant claims common.

*Held.* on demurrer to this replication:

5. That the replication was bad, because it alleged a parol grant by H. to plaintiff of a freehold interest running with the inheritance; which grant without deed could not bind the defendant, a stranger. Whether or not it bound the grantor, *quere*.

6. That the plea could not be construed as alleging that defendant pulled down the house while the family were absent, so that they could not return to it, and thereby were expelled; and, therefore, that the plea was bad, because it justified the expulsion as made in pulling down the house, which was unjustifiable while plaintiff's family were therein. *Perry v. Fitzhove*, 757.

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## Title.

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*Held*, by the Court of Queen's Bench, that the title of a patent must (though not as minutely as the specification) describe the nature of the invention; and that the patent is void if the title is so generally worded as to be capable of comprising not only the particular invention, but things not contemplated in it.

As where the patent was taken out "for improvements in carriages," and the invention was, in fact, an improvement in German shutters, which were used only in some kinds of carriages.

*Held*, by the Court of Exchequer Chamber, reversing the above judgment, that, where the title is not inconsistent with the specification, and no fraud is practised on the crown or the subject, it is not a fatal objection that the title is so general as to be capable of comprising a different invention from that for which the patent is claimed: That the title "for improvements in carriages" might be taken to mean improvements in some kinds of carriages, and did not necessarily imply any untrue assertion, though, in fact, the improvements were not applicable to all carriages: and that the patent was valid.

By the same court: Where a plea offers an insufficient defence, and a special verdict is found, affirming the allegations of the plea, and referring to the court whether the issue should be found for the plaintiff or defendant, the court will direct a judgment for the plaintiff non obstante veredicto, and not a verdict for the plaintiff on the issue. *Cook v. Pearce*, 1044.

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In an action for malicious prosecution for perjury, if the plaintiff, at the trial of the action, confine his case to one of the assignments, the defendant is not entitled to prove that there was reasonable and probable cause for the charge contained in the other assignment. *Ellis v. Abrahams*, 709.

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1. When necessary instead of taking issue on restricted plea.

Trespass for breaking and entering plaintiff's close called, &c., and cutting down and prostrating 100 yards of his rails there standing. Plea, a public right of way over the close, and that defendants were using the said way, and because the said rails were wrongfully erected upon, and standing in and obstructing, the said way, they prostrated the same, &c., which are the same supposed trespasses, &c. Replication, that the said rails were not standing in the said way, in manner, &c. Issue thereon.

The defendants had cut down some rails of the plaintiff standing on a public highway in the close described, and other rails belonging to him, which were in the said close and not on the highway.

*Held*, that the plaintiff could not recover; for, by taking issue on a plea which restricted the matter of dispute to the highway, he had excluded himself from proof as to rails in any other part of the close; and, to recover for these, he should have new assigned. *Bracegirdle v. Peacock*, 174.

2. When plaintiff may both reply and newly assign.

Case. Second count in trover for goods, to wit, ten pieces of timber.

5th plea, as to the pieces of timber in the 2d count mentioned, that they were ob-

structing a public navigable river, and defendant, having occasion to navigate, &c., removed the said pieces of timber, &c., which are the same grievances, &c.

Replication, as to the 5th plea, which is pleaded to the causes of action in the 2d count mentioned, and so far as they relate to the pieces of timber in the 2d count mentioned, that defendant of his own wrong, &c. committed the grievances, &c. so far as they relate, &c. in manner and form, &c.: and new assignment, that plaintiff sued, not only for the grievances in the 5th plea mentioned, &c., but also for, &c., alleging trover and conversion of pieces of timber other than, and different from, those in the 5th plea mentioned, and that defendant, for another and a different cause than that in the 5th plea stated, converted the last-mentioned goods in manner and form as the plaintiff hath above declared, &c.

*Held*, on special demurrer, that the replication was not bad for duplicity or as enlarging or departing from the declaration; and was well pleaded. *Page v. Hatchett*, 187.

3. Where both declaration and plea are general, 187. Ante, 2.

4. When plaintiff may not both reply and newly assign.

Declaration charged that defendant, to wit, on 1st January, 1844, with force and arms, "assaulted" plaintiff, and "then," with great force, &c. seized and shook plaintiff, and dragged him about, and struck him many blows, by means of which he was hurt and wounded, and was sick, &c., and so continued for a long time, to wit, one week, &c.

Plea 2. That defendant was lawfully possessed of a close, and a gate belonging to it, and plaintiff, a little before the time when, &c., with force and arms, and with a strong hand, and against the will of defendant, attempted to break open, and did then thereby unlawfully break open, the gate, and in breach of the peace did thereby attempt forcibly to enter and unlawfully trespass upon the close, and would then unlawfully and forcibly, &c. have effected such attempt, if defendant had not defended his possession; whereupon defendant, being in his close, during the unlawful attempt, defended his possession and resisted such attempt; and, because he could not successfully resist without in a slight degree committing trespasses, he did a little unavoidably, &c. commit the trespasses in the declaration, using no unnecessary force, which are the trespasses complained of.

Plea 3. That defendant was lawfully possessed of a cow being in a certain close, and plaintiff, a little before the time when, &c., did, against the will of defendant, en-

deavour to drive away, and dispossess defendant of, and was driving away from the close, the cow, and dispossessing defendant of the same, and would then unlawfully, forcibly, and in breach of the peace, have driven away, and dispossessed defendant of, his said cow; wherefore defendant, &c. (justifying as before, mutatis mutandis.)

On demurrer to the replication, held:

1. That, the trespass on the part of the plaintiff being alleged by the pleas to be forcibly made, the justification was sufficient, though it was not alleged that the plaintiff had been requested to desist.

2. That the pleas were not objectionable for omitting to show a good justification of the wounding.

3. That the third plea was not objectionable for omitting to show that the cow was on defendant's close.

4. *Held*, also: that the declaration showed only one trespass committed on a single occasion; and, therefore, that, to the above pleas, the plaintiff could not reply both *De injuriâ*—and also that defendant committed the trespasses in the declaration on other occasions than those in the pleas mentioned. On special demurrer to the replication for duplicity. *Polkinham v. Wright*, 97.

5. Where trespasses are complained of only on one occasion, 197. *Ante*, 4.

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1. When not by both traversing, and newly assigning, 187. *Ante*, XXVIII. 2.

2. When by both traversing and newly assigning, 197. *Ante*, XXVIII. 4.

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Of insurance. *INSURANCE*.

#### **POOR.**

I. Board of guardians: their constitution. *Incorporation*, 326. *Post*, II. 1.

II. Board of guardians: their powers.

1. In respect of parochial surveys.

The guardians of a poor law union cannot bind themselves by an order, not under seal, for making a survey and map (ac-

cording to stat. 6 & 7 W. 4, c. 96, s. 3,) of the rateable property in a parish forming part of the union: For such order is not a contract necessarily incident to the purposes for which the guardians are made a corporation by stats. 5 & 6 W. 4, c. 69, s. 7, and 5 & 6 Vict. c. 57, s. 16: and it is not intended by stat. 6 & 7 W. 4, c. 96, s. 3, that the guardians of a union should make themselves liable for the expenses of such plan.

Nor can such guardians bind themselves by a contract without seal (if they can in any manner contract) to remunerate a surveyor for attending as a witness on appeal against a parochial assessment within the union. *Paine v. Strand Union*, 326.

2. In respect of the remuneration of witnesses, 326. *Ante*, 1.

#### **III. Board of guardians: their contracts.**

1. What they may contract to do, 326. *Ante*, II. 1.

2. When their contract must be under seal, 326. *Ante*, II. 1.

3. If work be done for a corporation, for purposes connected with the corporation, under a verbal order, and accepted and adopted by them, they cannot, in an action to recover the price, object that no order was given under seal. *Senders v. St. Neot's Union*, 810.

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Evidence of their official character, 1037. *Post*, VI. 5.

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#### **VI. Parish property.**

1. In whom vested, 382. *CHURCHWARDENS*, I.

2. When not in parish officers.

In 1749, land was conveyed by deed to trustees, upon trust to permit the churchwardens and overseers for the time being of a parish to receive the rents, &c. to and for the use and benefit of the poor of that parish: and the deed gave the trustees for the time being power to lease for twenty-one years.

*Held* that, although the trusts were general, still the legal estate was not vested in the parish officers by stat. 59 G. 3, c. 12, s. 17; because there were known existing trustees under the deed, and the provisions of the statute were insufficient to divest their estate. *Deptford, Churchwardens v. Sketchley*, 394.

3. Special nature of trusts, 394. *Ante*, 1.

4. Special character of trustees, 394. *Ante*, 1.

5. Evidence of official character.

In ejectment under stat. 59 G. 3, c. 12, s. 17, for a parish house, on the demise of A. and B., stated in the declaration to be the churchwardens and overseers of a parish, the fact that they acted as church-

wardens and overseers at the time of the alleged demise, is sufficient *prima facie* proof, for the purposes of the action, that they held the offices at that time. *Doe dem. Bowley v. Barnes*, 1037.

VII. Rate: parochial survey.

Contract for making, 326. Ante, II. 1.

VIII. Ratable property: statutory exemptions.

1. Scientific and literary institutions: Religious Tract Society.

Stat. 6 & 7 Vict. c. 36, s. 1, exempts from parochial and other rates all land, houses, &c. "belonging to any society instituted for purposes of science, literature, or the fine arts exclusively, either as tenant or owner, and occupied by it for the transaction of its business," "provided that such society shall be supported wholly or in part by annual voluntary contributions, and shall not, and by its laws may not, make any dividend," &c. "in money unto or between any of its members."

*Held* that, to come within this exemption, a society must have an express law prohibiting any such dividend, &c.

*Semble*, that a society, instituted for the diffusion of religious principles and sentiments, though by literary means (such as *The Religious Tract Society*) is not within the exemption. *Regina v. Jones*, 719.

2. *Quære* as to religious institutions, 719. Ante, 1.

3. British and Foreign School Society.

By the rules of a society, it was provided That this institution should be designated The Institution for promoting education of the labouring and manufacturing classes of society, of every religious persuasion; and, for the purpose of making manifest the extent of its objects, the title of the society should be *The British and Foreign School Society*; that a school should be maintained to educate children for the purpose of supporting and training up teachers; and it was stated that the grand object of the institution was to promote education in general. In the normal school for training teachers, lectures were to be given on specified branches of literature, science, and the fine arts; also lectures on the art of teaching, and Bible lessons. Instruction was also given in needlework. There were model schools, for boys and girls, "for the purpose of elucidating the art of teaching;" and it was stated that "the number of children in them is large, in order to afford a sufficient scope and opportunity for the pupil teachers to instruct and put in practice the science of teaching; the object of the institution being to train up teachers who may promote education according to the particular system of this Institution, both in the United Kingdom and in the colonies."

*Held*, that the society was not "instituted for purposes of science, literature, or the fine arts exclusively," within the meaning of stat. 6 & 7 Vict. c. 36, s. 1; and, therefore, that the lands, &c. belonging to it were not exempted by that statute from rates.

The society obtained the barrister's certificate under the act, which was filed; after which an assessment of rates was made under a local act, (10 G. 4, c. cxxviii.) afterwards notice of the filing was given to the collector of rates, and to the trustees under that act; after which another assessment was made.

*Held*, that an appeal made within four calendar months next after the assessment last-mentioned, though not within four calendar months next after the assessment first-mentioned, was in time, within stat. 6 & 7 Vict. c. 36, s. 6, as being made "within four calendar months next after the first assessment" "after such exemption shall have been *claimed* by such society." *Regina v. Pocock*, 729.

4. Time of appeal, 729. Ante, 3.

5. Barrister's certificate not conclusive.

The certificate of the barrister under stat. 6 & 7 Vict. c. 36, (exempting scientific and literary societies from rates,) that a society is entitled to the benefit of that act, does not furnish conclusive proof that the society is so entitled. *Regina v. Phillips*, 745.

IX. Rate: right to copy.

The penalty imposed by stat. 17 G. 2, c. 3, s. 3, upon an overseer not giving a copy of a poor-rate on demand is claimable in the case of a poor-rate made under the regulations of stat. 6 & 7 W. 4, (the parochial assessment act,) the latter statute not repealing the former. *Tennant v. Cranston*, 707.

X. Rate: appeal against.

Liability for expenses, 326. Ante, II. 1.

XI. Maintenance in townships: separation.

1. Effect as to previously acquired settlements, 108. Post, XIV. 1.

2. Signature of notice of appeal after, 108. Post, XIV. 1.

XII. Binding of parish apprentices.

1. Allowance: by what justices.

An indenture for binding a parish apprentice purported to be "in execution of an order under the hands of G. B. and R. P.," justices "acting in and for the hundred of Teignbridge within the county of Devon." On the back of the indenture was the order for binding, purporting to be made by "G. B. and R. P.," "justices of the peace acting in and for the said county," (Devon.) At the foot of the indenture followed an allowance in the words, "We whose names are hereunder written, *justices of the peace*, (whereof one is of the quorum,) do consent



to allow," &c. "G. B., R. P." The order and indenture were both dated on the same day. *Held* that, although the allowance did not contain the words "justices of the peace acting in and for the county of Devon," yet it sufficiently appeared from the whole of the documents that the allowing justices were such, and were the same who made the order for binding.

In stat. 56 G. 3, c. 139, s. 1, the words "such justices shall sign the allowance of such indenture" mean the same justices who made the order for binding. *Regina v. Ashburton*, 871.

2. Allowance: when jurisdiction sufficiently appears, 871. Ante, 1.
3. Presumption that allowance was before execution, 871, 876. Ante, 1.

### XIII. Chargeability.

1. Examination when sufficient, 566. Post, XXIII. 2.
2. Statement of relieving officer, when insufficient.

The statement of the relieving officer of a union, in his examination before removing justices, that he relieved the pauper with money on account of a particular parish in the union, is no evidence that the pauper was chargeable to that parish. *Regina v. Bradford*, 571.

3. Some evidence of chargeability.

Examination as follows:—"I have lived in the township of P. for some time past, and am now residing in the workhouse in that town, my husband having run away and left me:" *Held* to be some evidence of chargeability to P. *Regina v. Manchester*, 572, n.

4. Evidence: certificate, 889. Post, XIX. 6.
5. Evidence of proof before removing justices, 889. Post, XIX. 6.

### XIV. Settlement: separation of districts.

1. Settlement acquired before separation.

A parish consisted of eight townships. Overseers were appointed annually, sometimes one for each township, sometimes one for two or more townships and others for the rest, and sometimes four for the whole district. There were churchwardens for the whole parish. An equal poor-rate was always agreed to, at a general parish vestry, by the churchwardens and overseers; and the rate of allowances to paupers was settled at such vestries. Separate poor-rates were made, allowed and published, and the money collected by the overseers in the townships for which they acted, and paid by them to the poor of their districts respectively. Those who had a surplus brought it to the parish vestry, and it was applied in aid of those who were deficient; if any balance remained, it was placed to the general account, and handed to the new overseers for the next year's expenses. In

1833, under a mandamus, the townships were divided, and became entirely separate in the appointment of overseers and management of the poor. Pauper, in 1815, gained a settlement by hiring and service; every thing which conferred the settlement taking place in G., one of the above townships. From 1815 to 1844 she received relief from G., while residing elsewhere. On appeal against an order made in 1844, removing her to G., the sessions quashed the order, subject to a case raising the question whether, on the above facts, the pauper was settled in G.

*Held*, that the settlement gained in 1815 did not confer a settlement in the newly separated district of G. And that relief given by G. was only evidence, on which the judgment of the sessions was conclusive.

Order of sessions confirmed: though the notice of grounds of appeal was signed only by the overseers of G., and not by the churchwardens of the parish in which the eight districts lay, and the sufficiency of the signature was a question submitted in the case. *Regina v. Acton*, 108.

2. Settlement acknowledged after separation, 108. Ante, 1.

### XV. Settlement: parental.

1. Acquired between separation and emancipation.

For the purpose of settlement, a son is not emancipated before the age of 21, unless he marries and so becomes the head of a family, or contracts some other relation so as wholly and permanently to exclude the parental control.

H. lived, till he was 17 years old, with his father; he then voluntarily entered the local militia and was sworn in for four years. He served, as required by law, 28 days in each year, and, during the residue of the time, worked as a weaver for wages, and maintained himself; saw his father occasionally, but never returned to live with him; and at the age of 20 he married.

*Held*, that H. was emancipated on his marriage, and not before, for that neither the service in the militia nor the employment at other times as a weaver created any relation permanently excluding parental control, and the emancipation by marriage did not relate back to the time when H. separated himself from his father.

And, therefore, that H. derived from his father a settlement acquired by him between that separation and the marriage. *Regina v. Scammonden*, 349.

2. When it is that emancipation takes place, 349. Ante, 1.

### XVI. Settlement: maiden.

Removal to, on what inquiry into husband's settlement.



The grounds of appeal against an order removing a widow, with her children, to her maiden settlement, were: 1. That the order and examinations were bad and insufficient on the face thereof respectively. 2. That there was no legal evidence of chargeability, and that the examinations do not prove relief. 3. That no legal evidence of relief was given. 4 and 5. That the examinations do not show any proper search for the settlement of the pauper's late husband. 6. That the justices had not jurisdiction to remove without evidence that the husband had no settlement, or none that could be discovered; and that the order was made without such evidence. 7. That the widow could have given information as to his settlement. 8. That the order describes the eldest son as legitimate, whereas the evidence on which it was made shows him to be a bastard. *Held:*

That, the general grounds of appeal being followed by specific ones alleging defects in the examinations, the appellants could not, under the general ground, object to the examinations for a cause not particularly specified; as, that they did not show a legal hiring and service, (on which the widow's settlement depended;) or that the jurat was imperfect.

The order, dated August 26th, 1844, purported to adjudicate on the settlement of "A. B., widow, and four of her children, viz. Henry, aged nine and a half years, James," &c. By the examinations it appeared that Henry was illegitimate, and of the age mentioned. *Held*, that the word "children," standing alone, meant legitimate children; and that Henry was therefore misdescribed, and the order, as to him, bad.

The widow, in her examination, said: "I never knew or saw any relation of my late husband; nor can I tell to what parish or place he belonged." Nothing further appeared as to his settlement. *Held*, that the widow was removable to her maiden settlement without further inquiry by the respondents as to the settlement of her husband. *Regina v. Birmingham*, 410.

**XVII. Settlement: apprenticeship.**

1. Sufficiency of examination to show binding not a parish binding, 561. Post, XXII. 1.
2. Allowance of binding of parish apprentice, 871. Ante, XII. 1.
3. What copies to be sent, 877. Post, XXII. 2.
4. Stamp, 877. Post, XXII. 2.

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1. Effect of the evidence always a question for the sessions, 108. Ante, XIV. 1.
2. Examination when sufficient, 566. Post, XXIII. 2.

**XIX. Removal: examination.**

1. Reading over to illiterate witness, 410, 418. Ante, XVI.
2. Some generality allowed, 561, 566. Post, XXII. 1. XXIII. 2.
3. Need not show amount of stamp, 877. Post, XXII. 2.
4. Presumption of stamp being such as to render document admissible, 877. Post, XXII. 2.
5. Allegation of a thing being *duly* done, when sufficient, 877. Post, XXII. 2.
6. Evidence of chargeability: certificate.

On trial of an appeal against an order of removal, it appeared that one of the documents transmitted as copies of the examinations was a document purporting to be a copy of a certificate of chargeability. It followed the form in sched. (C) to stat. 7 & 8 Vict. c. 101; and appeared to be duly executed according to sect. 69; and the names of the paupers therein corresponded with the names of the paupers in the order of removal. On it was written a copy of a statement, signed by two justices of the same county, and bearing the same names, with the removing justices, and which declared that the certificate was received by them in evidence on a day named. The day was that of the date of the order of removal. The statement did not show that the certificate was received in the matter of the particular complaint. The examinations contained no other evidence of chargeability, and did not refer to the certificate. *Held:*

That the transmission of the copies of examinations, and copy of the certificate, thus vouched, were sufficient to satisfy the requisites of stat. 4 & 5 W. 4, c. 76, s. 79; and that the copies contained sufficient evidence of the paupers being chargeable, and of the chargeability having been proved before the removing justices. *Regina v. High Bickington*, 889.

7. Evidence of documents having been in proof before removing justices, 889. Ante, 6.
8. Identity on face of documents, 889. Ante, 6.

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**XXI. Order of removal: description of parties.**  
Illegitimate child, to be so described, 410. Ante, XVI.

**XXII. Order of removal: sending of copies.**

1. Insufficiency of copies how to be objected to.

On objection, stated in grounds of appeal, that "no copy of an order of removal has been sent," appellants cannot allege that the copy sent is defective and inaccurate in not setting out the name of one of the paupers.

**PRIORITY.**

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1. To justices acting within their jurisdiction, on suggestion of misconduct. *Griffin v. Ellis*, 149, n.

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**QUO WARRANTO.**

I. For what office.

Not for private franchise: school-master.

*P.*, by will, directed that six poor persons of E. parish should have a weekly allowance and lodging in an almshouse to be built in E.; and he devised lands to trustees, out of which the expense was to be defrayed, and also on condition that the trustees should find a person qualified to keep a free grammar school in E. or in R.; and the will gave directions concerning the rule of the school, and the putting in and paying the schoolmaster and usher.

Afterwards, by charter, reciting the will, and that there had been built an hospital at E., in which poor persons were relieved, and a free school at R., it was granted that there should be in E. an hospital, and in R. a free grammar school, the said hospital and school to consist of a master, a schoolmaster, ushers, poor men, and poor scholars, who were made a corporation; that there should be governors, with power to correct abuses and make laws for the governing of the corporation and their lands and goods; that the master should be a Master of Arts of Oxford or Cambridge, and a preacher of God's word, and should, in person or by deputy, preach once every Sunday in the parish church of E., and read prayers twice every day in the week in that church.

By act of parliament (5 G. 4, c. 38, private) it was enacted that the affairs of the corporation, without prejudice to the powers and privileges of the governors, should be managed by a court of managers, consisting of certain members of the corporation. And it was provided that, when any of the governors should be a minor or under legal disability, the guardian, &c. of such governor should act in his stead.

*Held*, that the mastership was not an office for which an information in the nature of a quo warranto would lie. *Regina v. Mousley*, 946.

II. Effect of incorporation by charter, 946  
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III. Effect of regulation by act of Parliament, 946. *Ante*, I.

**RATE.**

Power to rate lands, &c. and other tenements: tithe, when not included.

A local act enabled trustees for rebuilding a parish church to borrow money, and charge it on rates, to which the trustees should "assess all and every person and persons who do or shall inhabit, hold, or occupy any land, house, shop, warehouse, vault, mill, or other tenement within the said parish:" half the rate to be paid by the owner or landlord and half by the occupier or tenant: tenants or occupiers to pay the whole in the first instance, and deduct the half out of the rent: power of distress was given, if any person should omit to pay for thirty days after personal demand or written demand left at his place of abode; power of imprisonment if he secreted his goods; power of distress if any person assessed should quit his land, dwelling-house, warehouse, shop, vault, mill, or other tenement, in respect whereof he should be so rated as aforesaid, before paying his said rate; and it was enacted that any person appointed by the trustees might inspect the books of the poor-rate and land-tax, to ascertain the rates to be levied under this act.

*Held*, that the vicar was not rateable in respect of his tithes as an "other tenement." *Regina v. Nevill*, 452.

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1. That it was not necessary that the second rule should be drawn up on reading the first, provided it adverted to the first, which was in court.

2. That the second rule, and the affidavits in it, ought not to be entitled, "A., deceased, against B.;" and, the rules and affidavits being so entitled, the rule was discharged. *Bland v. Dax*, 126.

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 Under stat. 5 & 6 W. 4, c. 70, ss. 66, 67, a corporation executed a bond for payment of an annuity to a person removed from office, and also for payment, on demand, of arrears due before the date. The obligee consenting not to press for the arrears, the council passed a resolution to pay him interest thereon.  
*Held*, that such resolution, and orders of the council for payment of the interest, were unsanctioned by s. 92, and were liable to be quashed on being brought up by certiorari.  
 And, per Patteson, J., that, independently of this objection, the resolution not being under seal, could not bind the corporation.  
 The corporation had, during all the time of living memory, repaired from the corporation funds a pew in a parish church to which the members of the corporation had been used, in their character of corporators, to resort for worship. It did not appear that the corporation possessed any hall or other building within the parish. *Held*, that such repairs might be defrayed from time to time under sect. 92. *Regina v. Warwick Council, 926.*  
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## I. Power of commissioners as to boundaries.

## 1. As to boundary of parishes.

Stat. 6 & 7 W. 4, c. 71, s. 45, empowering the Tithe Commissioners to decide any question touching the "boundary of any lands," does not authorize them to settle, by their award, a dispute as to the boundary of parishes.

Nor can they do this under the powers granted by stat. 7 W. 4 & 1 Vict. c. 69, s. 2, even at the request of two-thirds in value of the land-owners, if the boundary of the parishes be also a boundary between counties.

For, by stat. 2 & 3 Vict. c. 62, s. 37, this and the two prior acts are incorporated; and sect. 34 of stat. 2 & 3 Vict. c. 62, forbids the Commissioners to adjudicate on a boundary which divides counties as well as parishes. [But see pp. 43, 58, post, 2.]

If the Commissioners are proceeding to adjudicate on such a boundary: *quare*, whether prohibition lies.

But the court, in such case, made a rule absolute for a prohibition, the Commissioners showing cause and making no objection on this ground.

*Quere*, Whether a parochial agreement for a commutation rent-charge can legally be made and confirmed, under stat. 6 & 7 W. 4, c. 71, ss. 17, 27, &c., while a dispute exists as to the boundary of the parish. *In re Ystradgunlais Commutation*, 32.

## 2. As to boundary of parishes.

To a motion for certiorari to bring up the award of an assistant Tithe Commissioner, it is no answer that the award is already in court under certiorari, obtained by another party.

Stat. 6 & 7 W. 4, c. 71, s. 95, took away certiorari in the case of orders and adjudications made by the Tithe Commissioners under that act. Stat. 7 W. 4, & 1 Vict. c. 69, s. 2, empowers the Commissioners to settle parish boundaries; and sect. 3 gives a certiorari to any person interested in the judgment respecting the said boundaries, who shall

be dissatisfied therewith, and enacts that, on removal of such judgment under the writ, the decision of the court thereon shall be final and conclusive as to the boundaries. *Held*, that, on the certiorari thus restored, the court was authorized to consider, not only the merits of the decision as to boundary, but all questions usually discussed on certiorari.

The award of an assistant Tithe Commissioner employed to settle the boundaries of a township on request of the landowners, under stat. 7 W. 4, & 1 Vict. c. 69, s. 2, was quashed, on certiorari, as not sufficiently showing jurisdiction:

1. Because it did not state the district to be one of which the tithes were "to be commuted."

2. Because it stated the request to have been signed, not "at a parochial meeting called for that purpose," "according to the provisions of" stat. 6 & 7 W. 4, c. 71, s. 17, (referred to by stat. 7 W. 4, & 1 Vict. c. 69, s. 2,) but only "at a meeting called for that purpose."

In stat. 2 & 3 Vict. c. 62, s. 34, (giving the Commissioners power, on requisition, to ascertain old or set out new boundaries,) the proviso "that nothing in this provision" shall extend to any boundary line of a county, or of copyhold without consent of the lord, applies only to the enactments in the same clause. And sect. 37 of stat. 2 & 3 Vict. c. 62, which incorporates it with stat. 7 W. 4, & 1 Vict. c. 69, does not abridge the power given by sect. 2 of the prior act.

Therefore, in a case under stat. 7 W. 4, & 1 Vict. c. 69, s. 2, the Commissioners may ascertain the existing boundary of a parish, though it be also that of a county, or of copyhold in a manor, the lord of which does not consent to the inquiry.

An award under that clause can be made only where the tithes are "to be commuted:" and there is no jurisdiction under it if the tithes have been commuted already. *In re Dent Commutation*, 43.

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2. Apportionment: on what principle.

On a commutation of tithes under stat. 6 & 7 W. 4, c. 71, the valuer made an apportionment which was objected to by landowners in the parish, and the objectors heard, first, by the Assistant Commissioners, who received evidence for and against the objections, and, then, by the Tithe Commissioners, according to sect. 61.

It appeared that the tithes of corn and grain in the parish were payable to the rector, and moduses for all other tithes, to the vicar. A rent-charge, in lieu of such tithes and moduses, had been awarded under sect. 36. H., one of the above landowners, held ancient pasture land of the Dean and Chapter of Canterbury by lease, which forbade him to plough the land without their license in writing, for which he had never applied or purposed applying: but lands of the Dean and Chapter within the same district had been ploughed within living memory. Part of the lands in the parish was woodland. The valuer, in apportioning the rent-charge, under sects. 33, 44, upon H.'s pasture lands, assessed them to the vicar's rent-charge according to the modus, and added a small portion of rent-charge to be paid to the rector as part of the gross rent-charge awarded to him, where it seemed that the productive quality of the land admitted of its being arable, and that there was a reasonable probability of its being tilled: but he made no such additional assessment on the woodland, not considering that a reasonable probability existed of that land becoming arable. The objectors disputed both the facts and the principle of assessment. The Commissioners, having inspected the evidence given as above stated for and against the objections, decided that they would confirm the apportionment if they were not forbidden by a superior court.

On a motion for a prohibition, *Held*,

That a prohibition did not lie, the Commissioners having acted within their statutory jurisdiction, and according to law. And

That the apportionment was right in principle. *In re Appledore Commutation*, 139.

3. Probable change of cultivation, 139. Ante, 2.

VII. Rates on.

When not ratable as a tenement, 452. RATE.

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1. Of cause to perpetuate testimony, 208. EVIDENCE, XIII. 1.

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#### TOOLS.

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1. For breaking and entering a several fishery, 1000. FISHERY, I. 1.

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II. Qu. cl. fr. who may maintain.

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Against attorney for wrong levy, when 677. ATTORNEY, IX. 1.

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2. What is a count in trespass, 1000 FISHERY, I. 1.

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- I. Right to begin, 673. **COUNSEL.**
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**TROVER.**

- I. When it lies.  
By assignee of bankrupt for bills of exchange, 1. **BANKRUPT, III.**
- II. Damages.  
Special, 779. **DAMAGES, II.**
- III. Pleading.
  1. Joint ownership of plaintiff and defendant: a bad plea.  
To a declaration in trover, defendant pleaded that, before and at the time of the committing, &c., he and plaintiff were jointly and together the owners and proprietors of the chattel.  
*Held* bad, on special demurrer, because, if the conversion was denied, the plea amounted to Not guilty, and, if it was confessed, the plea could be understood only as confessing a destruction of the chattel, which was not justified. *Higgins v. Thomas*, 908.
  2. Not Guilty: what plea amounts to, 908. *Ante*, 1.
  3. In confession and avoidance: what is confessed, 908. *Ante*, 1.
  4. New assignment, 187. **PLEADING, XXVIII. 2.**

**TRUCK.**

What contract not within the act.

Plaintiff, a frame-work knitter, worked as a weaver of gloves for defendant, in frames provided by defendant, at an agreed gross price per dozen pairs. Defendant was a sub-contractor, furnishing the work, by agreement, to a master manufacturer, who found machinery and materials. Defendant settled with plaintiff weekly for the work done, deducting out of the gross price per dozen certain charges, which were according to the known custom of the trade: namely:

1. A frame rent per week.
2. A payment per week for use of defendant's

premises to work in, standing room for the frame, defendant's trouble and loss of time in procuring materials and conveying them to plaintiff, defendant's responsibility to the master manufacturer under whom he contracted for the work, superintendence of the work, sorting the goods when made, and delivering them to the master manufacturer.

3. Payments to a boy for winding the yarn; and wear and tear of machinery.

4. A penny per shilling on the net sum earned by plaintiff above 14s. per week, as compensation to defendant for a percentage paid by him to the master manufacturer on the amount of goods manufactured by defendant for him with machinery rented of him by defendant. There was no written contract between plaintiff and defendant.

*Held*, that the agreement to pay plaintiff's wages with these deductions was not a contract to pay part of such wages other wise than in the current coin, within sect. 1 of the Truck Act, 1 & 2 W. 4, c. 37; nor was a contract in writing under sect. 23 necessary to legalize such deductions.

*Held*, also, that there was not in this case any demise of a "tenement" within sect. 23; and, *quære*, whether there was a demise of any thing at a rent thereon reserved, within that clause. *Chawner v. Cummings*, 311.

**TRUSTEE.**

- I. Term in setting up against cestui que trust, 429. **ANNUITY, I.**
- II. Of parish property, 382. **CHURCHWARDENS, I. 394. POOR, VI. 2.**
- III. Of turnpike road, 169. **TURNPIKE, I.**

**TURNPIKE.**

- I. Demise of tolls: pleading.  
Forms on letting.

In an action for rent payable under an agreement with trustees of turnpike roads, demising tolls and toll-houses, the declaration need not show that the forms required by stat. 3 G. 4, c. 126, s. 55, were observed in the letting.

It is sufficient if the count states that, at a meeting of the trustees, held at, &c., the tolls, &c., were put up to be let by auction under certain conditions, &c., at which meeting A. B. was the last and highest bidder, and thereupon, by a memorandum of agreement, &c., it was witnessed, &c.; mutual promises, and entry of defendant.

In an action on such agreement, if the instrument be produced, stating that the trustees have contracted, &c. with the lessee, "witness the hands of C. and D., two of the trustees," &c., and of the defendant, and the signatures of defendant and of C. and D. be proved, such instrument is evidence against the defendant that C. and D. were trustees, and will support a verdict against him in an action at their suit

- as trustees, though there be no other proof that they were so. *Wellington v. Browne*, 169.
- II. Demise of tolls: evidence.  
That demising parties were trustees, 169. Ante, I.
- III. Penalties, convictions, and commitments.  
1. For taking less than the legal toll, 13. CONVICTION, III. 1.  
2. Protection of persons acting bonâ fide under stat. 3 G. 4, c. 126, 13. CONVICTION, III. 1.

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USAGE.

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USE AND OCCUPATION.

- I. Rent a question for the jury, 95. LANDLORD AND TENANT, III.
- II. Of parish property, who must sue, 382. CHURCHWARDENS, I. 394. POOR, VI. 2.

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- II. Judgment non obstante, 1044. PATENT.

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- I. Insured, 781. INSURANCE, I. 1.
- II. When it begins, 467. CHARTER-PARTY, I.

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Of request to perform contract, 358. MARRIAGE, I. 1. 371. CONTRACT, XII. 2.

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What state of hostilities does not amount to, 781. INSURANCE, I. 1.

WARRANT.

- Of commitment.
- I. For not finding sureties, 1020. JUSTICE, IV. I.
- II. What it need not fix, 1020. JUSTICE, IV. 1.

WARRANT OF ATTORNEY.

I. Executed abroad.

Rule to set aside: authority for application.

W. executed, at Brussels, in June, 1843, a warrant of attorney to confess judgment and judgment was entered on it. In January, 1846, a rule nisi was obtained to set the warrant and judgment aside. There was nothing to show that W. authorized the application, except that the affidavit in support of the rule was made by a party who styled himself clerk to L., "attorney for the above-named defendant."

Held, that it ought to have appeared more expressly that the application was made on behalf of W.: and the court discharged the rule, but without costs. *Hume v. Lord Wellesley*, 521.

II. Setting aside.

What the affidavits must show, 521. Ante, I.

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HIGHWAY. TURNPIKE.

WHARF.

Evidence of possession, 593. EVIDENCE, XIX. 2.

WIDOW.

Page 410. POOR, XVI.

WIFE.

BARON AND FEME.

WILL.

I. What instrument may operate as:

Disposition after death in power of attorney attested as a will.

P., being in India, in 1840, executed the following instrument, attested by two witnesses.

"Know all men," &c., "that I make," &c. E. my "lawful attorney, for me in my name and to my use to ask, demand," &c., "or receive the possession of, or produce of, the rent of the freehold of," &c. "And I do empower her, the said" E., "to hold and retain all proceeds of the said property for her own use until I may return to England, and claim possession in person; or in the event of my death, I do hereby, in my name, assign and deliver to the said" E. "the sole claim to the before-mentioned property, to be held by her during her life and disposed of by her as she may deem proper at the time of her death: at the same time I wish it to be understood that I claim all right and title to the said property on my arrival in Great Britain, when the term of the said" E.'s "occupancy shall be considered at an end." "In witness," &c.

The instrument was acted on as a power of attorney by E. Afterwards P. died in India, without returning to Great Britain, and left E. surviving.

Held, that the instrument operated on P.'s

death, as a devise to E. *Dee dan. Cross v. Cross*, 714.

II. Probate, 576. EVIDENCE, XIX. 1.

#### WITNESS.

I. Remuneration of.

By guardians, on an appeal against a parochial assessment, 326. *POOR*, II. 1.

II. Expert: foreign lawyer, 208. EVIDENCE, XIII. 1.

III. Commission to examine.

1. Under bill to perpetuate testimony, 208. EVIDENCE, XIII. 1.

2. Issued *ex parte*, 208. EVIDENCE, XIII. 1.

3. Deponents out of jurisdiction, 208. EVIDENCE, XIII. 1.

4. Opportunity to cross-examine, 208, 246. EVIDENCE, XIII. 1.

IV. Refreshing memory.

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II. Relation between time of granting and time of issuing, 981. AMENDMENT, I.

III. Recital of.

1. In declaration, 1000. FISHERY, I. 1.

2. In issue, 1000. FISHERY, I. 1.

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From what words implied, 1034. LANDLORD AND TENANT, IX.











